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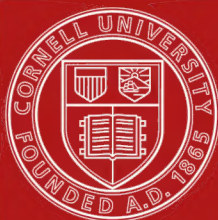
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THE CIVIL LIABILITY
FOR
PERSONAL INJURIES.

THE
CIVIL LIABILITY
FOR
PERSONAL INJURIES
ARISING OUT OF
NEGLIGENCE.

BY
HENRY F. BUSWELL,
AUTHOR OF "THE LAW OF INSANITY," "LIMITATIONS AND ADVERSE
POSSESSION;" EDITOR OF "TAYLOR'S LANDLORD
AND TENANT," ETC.

SECOND EDITION,
REVISED AND ENLARGED.

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PREFACE TO THE SECOND EDITION.

IN the preparation of the present edition, the text of the work has been revised, all errors discovered corrected, and obsolete and redundant matter expunged. A great amount of new matter has been added under the respective section heads, and a number of supplementary sections inserted. The cases, reported since the publication of the first edition, have been examined, and about seventeen hundred citations from the decisions of the courts of last resort added to the work.

Gratefully acknowledging the favor with which the the first edition of the book has been received, the author believes that its thorough revision, and the additions made to it in the present edition, will be found materially to have increased its value, both to the student and the practising lawyer.

H. F. B.

Boston, August, 1899.

PREFACE TO THE FIRST EDITION.

IN the present work, it has been the design of the author to state the principles which, in actions for personal injuries, caused by negligence, create, as between the parties, the relations of plaintiff and defendant; to discuss the law of negligence, so far as this is to be applied to the subject-matter of the work; to consider the rules applicable in cases of liability created by statute; and, finally, to discuss the general rule of liability as this is modified by the existence, between the parties, of the relation of employer and employee. It is upon this branch of the general subject, that the tendency of the later leading decisions in the United States has been to modify the somewhat narrow interpretation of the common law, in favor of the master, expressed in certain leading English cases; and it is hoped that that will be found not the least valuable part of the work in which the relation of master and servant is discussed. The plan of the work, in detail, appears in the Analytical Table of Contents.

In his treatment of the subject, the author has attempted to state clearly the principles of the law, and sufficiently to illustrate these by the citation of

the facts of decided cases, but he has avoided overloading the work with the full statement of cases merely cumulative; a practice which, in his judgment, has the result to confuse and perplex the student. So, the leading principles of the law, as settled by the weight of authority, are stated in the text of the work; the discussion of collateral matters, and disputed or doubtful points or cases, being reserved, generally, for the footnotes.

Well knowing that, in a work covering so large a field and touching so many and difficult questions, some errors of opinion, or omissions of important matters, must appear, the author refers his book to the intelligent criticism of the profession to whose favor, which he here gratefully acknowledges, he already owes so much.

H. F. B.

Boston, April, 1893.

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PERSONAL INJURIES.

CHAPTER I.

OF PARTIES PLAINTIFF.

SECTION I.

GENERALLY: OF THE NATURE AND FORM OF THE ACTION.

§ 1. **Subject of the Work the Civil Action in Tort.**—In the present work, it is intended to discuss those cases only in which the action rests upon negligence on the part of the defendant, the element of express malice, or criminal intent, being excluded from consideration. But it is obvious that many cases involve two elements, and so call for the application of either the civil or criminal remedy, or of both. Thus in the familiar case of the wrongful beating of a servant, the wrongdoer is liable to a criminal prosecution, as for a breach of the peace; to an action of tort in the nature of trespass, by the injured servant, to recover such damages as he may have suffered by reason of the beating; and to an action in the nature of trespass on the case, brought by the master to recover such damages as may have resulted to him by reason of his loss of the services of his servant, through the wrongful act of the defendant.

§ 2. **The Civil and Criminal Remedies independent of each other.**—In an early English case, occurs a dictum that “if one beat the servant of J. S., so that he die of the beating, the master shall not have an action against the other, for the battery and loss of service, because it has now become an offence against the crown, and turned into a felony, and this

has drowned the particular offence.”¹ It is said that this doctrine arises out of the feudal law, which would not allow a prosecution for a civil injury where the act complained of amounted to a felony, because the crime worked a forfeiture of the feudal grant and of the criminal’s personal estate, so that there could be nothing left to satisfy the private demand. But this doctrine has long ceased to be law in England,² and has never been recognized in the United States, where attainder, or the forfeiture of the criminal’s estate, is unknown.³ In some jurisdictions, the statute provides that the right of action of a party injured by a felony shall not be impaired.⁴ It is certain that, at common law, after a trial, and conviction or acquittal, for a felony, an action might be maintained for the civil injury,⁵ and it is said: “This is but a suspension of the civil remedy until the offender has been tried for the public offence; and it is based upon grounds of public policy, making it the interest of parties who have suffered the private injury to prosecute the offender; to perform their duties to the public before they seek private redress.”⁶ It was held in several cases, in the United States, that where the injury sued for was caused by act amounting to a felony, the injured party could not maintain an action therefor until he had first instituted criminal proceedings for the felony.⁷ But this rule seems never to have been generally adopted, and now, in many of the States, it is provided by statute that in actions to recover damages for the negligent killing of persons, such action may be maintained although no previous prosecution for the criminal act has been instituted.

¹ *Higgins v. Butcher*, 1 Brownl. 205.

² See 1 Hale, P. C. 546; *Crosby v. Leng*, 12 East, 409; *Osborn v. Gillett*, 8 Exch. 88.

³ *Green v. Hudson River R. R.*, 28 Barb. 9, affirmed 2 Keyes, 294; *Hyatt v. Adams*, 16 Mich. 180.

⁴ See N. Y. Rev. Stats. 292, § 2; Kentucky Rev. Stats. c. 28, § 4.

⁵ 1 Latch, 144; *Styles*, 347; 1 Hale, P. C. 546; *Crosby v. Leng*, 12 East, 409.

⁶ *Hyatt v. Adams*, 16 Mich. 180.

⁷ *McGrew v. Cato*, 1 Minor (Ala.), 8 (1824); *Blackburn v. Minter*, 22 Ala. 613; *Martin v. Martin*, 25 Ala. 201; *Nelson v. Bondurant*, 26 Ala. 341. See *contra*, *McBain v. Smith*, 13 Ga. 315; *Hutchinson v. Wheeling, M. & M. Bank*, 41 Penn. St. 42.

§ 3. **Breach of Public Duty the Foundation of the Action: Principle Illustrated.** — The law imposes upon every member of the community certain civil obligations and duties in respect of every other member, and, setting aside from consideration such breaches of duty as involve on the part of the delinquent the exercise of actual malice or criminal intent, there remains a class of cases in which the person injured by the breach of duty may have a remedy for his injury by an action sounding in tort. Thus the principle embodied in the maxim *sic utere tuo ut alienum non lædas* creates a duty in the owner or occupant of land or buildings to exercise due care in maintaining and keeping the premises, and the approaches thereto, in a reasonably safe condition, so that persons lawfully and prudently entering thereon may not suffer injury. The same principle is applied in the rule which makes one who maintains upon his land a common or public nuisance, as a dangerous pit or excavation contiguous to a highway, liable in damages to another who thereby suffers bodily injury.¹ Again, the custom of the realm of England, long made a part of the common law, imposes upon common carriers of passengers certain public duties in respect of such passengers for a breach of which a passenger injured may have his remedy by an action of tort.²

§ 4. **Form of the Common-Law Action.** — For the breach of the duty thus created, the injured person may have his remedy by an action of tort in the nature of trespass to the person, if the injury be direct,³ or of tort in the nature of trespass on the

¹ *King v. Dewsnap*, 16 East, 194; *Duncan v. Thwaites*, 3 B. & C. 556, 584; 5 D. & R. 447.

² *Bretherton v. Wood*, 6 Moore, 141, 3 Brod. & B. 54, as cited *post*, § 5; *Nolton v. Western R. R.*, 15 N. Y. 444; *Head v. Georgia Pacific Railway*, 79 Ga. 358; § 115, *post*, notes and cases cited. In *Pippin v. Shepherd*, 11 Price, 400, which was an action against a surgeon for malpractice, it was held to be immaterial by whom the defendant was retained, or by whom his services were to be paid.

³ See *Martinez v. Gerber*, 3 Scott, N. R. 386; 3 M. & G. 88. If the act complained of cause the immediate injury, whether it be intentional or unintentional, the proper action is trespass. See *Percival v. Hickey*, 18 Johns. 257; *Guille v. Swan*, 19 Johns. 381, 382.

case, where the injury is not direct, but so closely connected with the negligent act of the defendant as reasonably to be referred to it as a natural and probable consequence which the defendant was bound to anticipate.¹ Among the many cases arising from this breach of duty, are (1) those arising from accidents caused by collision by reason of careless driving on the highway;² or by the careless management of railway trains,³ in which class of cases the plaintiff's remedy is in the nature of trespass; and (2) by the careless vending of dangerous or noxious substances, whereby the purchaser from the defendant's vendee suffers damage, in which class of cases the plaintiff's remedy is by an action of trespass on the case.⁴

§ 5. **Concurrent Remedies in Contract and Tort: but Action rests on Breach of Duty.** — In an important class of cases, notably those arising between carriers for hire and passengers, a contract relation subsists between the parties, and the injured party may have his option to sue in tort for the breach of the general duty, or in contract for the breach of the contract obligation; or he may join counts in contract and tort and afterwards elect which form of action he will pursue.⁵ "It is at the election of the plaintiff to declare in assumpsit, and rely on the promise, or to declare in tort and rest on the breach of duty."⁶ The measure and burden of proof and the rule of damages will ordinarily be the same whether the action sound in contract or tort;⁷ but the actions are distinct and rest on different grounds. Generally the contract cannot vary the extent or character of the duty; but it may create the relation as to which the duty arises.⁸ Thus, as between

¹ See §§ 97 *et seq.*, *post.*

² See § 99, *post.*

³ See §§ 118 *et seq.*, *post.*

⁴ See §§ 129 *et seq.*, *post.*

⁵ *Ingalls v. Bills*, 9 Met. 1.

⁶ *Per Shaw, C. J.*, in *McElroy v. Nashua & Lowell R. R.*, 4 Cush. 400, 403.

⁷ *Eaton v. Boston & Lowell R. R.*, 11 Allen, 500.

⁸ *Ames v. Union Railway*, 117 Mass. 541. It is obvious that the measure of care to be required of the defendant, and thus the question whether he has been negligent, may in some cases be affected by the terms of the contract between the parties. And this is so whether the plaintiff seek his remedy in contract or tort. *Ibid.*

passenger and carrier, the duty of the carrier is imposed by the common law as to all passengers, while the contract merely creates the relation of carrier and passenger as between the parties. While it is true that the defendant has contracted with the plaintiff to do carefully that which he has bound himself to do,—namely, to transport the passenger safely to his destination,—this duty exists, at common law, independent of the contract; and if the plaintiff elects to waive the contract, he may sue in tort for the breach of duty. And although the passenger is bound to prove the contract, this is for the purpose of showing that he has put himself within the class of persons as to which the common-law duty attaches.¹ So it is said that

¹ See *Bretherton v. Wood*, 6 Moore, 141, 3 Brod. & B. 54. This was an action of case brought against several proprietors of a stage-coach for injuries suffered by the plaintiff, a passenger therein, by the oversetting of the coach through the alleged negligence of the defendants. The jury having found a verdict against some of the defendants, and in favor of the others, the question was whether such a verdict could be supported. It was held, in the Exchequer Chamber, that as the action was founded upon a breach of duty imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, the verdict and judgment thereon should be affirmed. The case was most elaborately argued, and Dallas, C. J., in giving judgment, said: "It was contended that the statement of the case in the declaration amounts to a contract, and that being so, all the rules applicable to actions founded on contracts must govern this, and that it is a rule of law that such actions are joint, and it must be maintained against all the defendants . . . or fail altogether. . . . But we are of opinion that this action is not so founded, and that on the trial it could not have been necessary to show that there was any contract, and therefore that the objection fails. This action is . . . against common carriers, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey goods and passengers safely and securely, so that by their negligence or default no damage or injury happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, and which requires not the aid of a contract to support it. . . . Nor is it material whether redress might or might not have been had in an action of *assumpsit*; . . . whether such action might or might not have been maintained; still this action . . . may be supported. . . . If the action be not founded on a contract, but on a breach of duty depending on the common law, on a tort, or misfeasance, it cannot be contended that the judgment is erroneous; for from the nature of the case and the form of action it is several and not joint." See also *Marshall v.*

by the ordinary implied contract of service between master and servant the master binds himself to furnish the servant suitable means and appliances for doing the work, and competent and careful employees to work with the servant; but it is not the less true that the master is bound to this duty independent of any implications from the contract; so that for a breach of the duty the master is liable at common law.¹ And it is apprehended that in an action for the breach of duty, proof of the contract is necessary only for the purpose of showing that the relation of master and servant existed between the parties when the breach of duty occurred.²

§ 6. **Illustrations of the Rule.**—The distinction between the contract duty and the public duty is further recognized in the rule which prevails generally in the United States,—that the carrier may not, by the terms of his contract with the passenger, avoid the general duty of exercising extreme care in transporting the passenger.³ The different principles lying at the foundations of the two forms of action are also illustrated by the fact that in certain cases a third person, not in privity with the injured person, may have an action for the defendant's breach of the general duty, although the defendant's wrongful act was also a breach of an existing contract

York, Newcastle, & Berwick Railway, 21 L. J. (N. S.) C. P. 34, and cases cited *post*, § 11, note.

¹ See § 192, *post*.

² Those cases are to be distinguished in which the liability of the defendant rests upon a breach of a special or implied contract by which the defendant warrants the plaintiff against injury; for in these cases the liability does not rest upon the question whether the defendant was actually negligent, and the action against him must therefore sound in contract as for a breach of the warranty. Thus it is held to be the duty of a livery-stable keeper to provide horses suitable for the purposes for which they are to be let; and on the question of the liability of such stable-keeper for an accident caused by the viciousness of a horse so let, it is immaterial that the keeper did not know that the horse was vicious. And in action brought for the injury, the plaintiff must sue in contract for the breach of implied warranty; but if he relies wholly or in part upon the actual negligence of the defendant, he may allege this in a count in tort. See *Horne v. Meakin*, 115 Mass. 326.

³ See §§ 116, 117, *post*.

between himself and the injured person; as where a master is permitted to recover damages resulting from his loss of the services of his servant through the fault of a carrier who had agreed with the servant to transport him safely and had failed to do so.¹ The rule in these cases is founded upon the consideration that the master has a property in the service of his servant, of which property the breach of the defendant's public duty as a carrier has deprived him.² So it is held that a railroad corporation which leases its road to an individual without authority of law remains answerable to a passenger injured by the negligence of the servants of the lessee, although the contract of transportation is made with the lessee; the reason being that as the corporation owes a duty to the public it cannot avoid this by an illegal transfer of its franchise; and the transferee in such case will, as to the performance of the public duty, be taken to be the agent of the corporation.³

§ 7. **Remedies created by Statute.**—There are also certain duties, not recognized by the common law, but created by statute, for the breach of which the remedy is in tort. Among these is the duty generally imposed upon municipalities to keep and maintain public highways in a safe condition for travellers.⁴ Of the same class is the liability imposed by statute, in many jurisdictions, upon employers, in certain cases,

¹ See § 11, *post*.

² 3 Black. Com. 142.

³ See *Abbott v. Johnstown, &c. Horse Railroad*, 80 N. Y. 27, as cited *post*, § 49. There is a line of English cases which would seem to hold, where a contract relation subsists between the parties, and by reason of the defendant's negligence in carrying out the contract the plaintiff is injured, that the action for the injury is to be founded solely upon the breach of the contract, and that although the form of the action be in tort, yet all the essential incidents of an action of contract attach to it. This question becomes of importance in considering the matter of joinder of defendants, see § 31, *post*, and the rights of third parties to sue. See § 11, *post*. It is believed that the view of the law indicated in the cases referred to is not to be supported by sound reason or the general tenor of authority. For a full discussion of the cases touching this question, see § 11, *post*, and note.

⁴ See §§ 53-56, 60-63, 167 *et seq.*, *post*.

for injuries suffered by their servants by reason of the negligence of a fellow-servant.¹ So the statute now generally permits damages resulting to the heirs, widow, or next of kin of one killed by the negligence of another, to be recovered for their benefit by the personal representative of such deceased person.² And in some jurisdictions the negligent killing of a person may be made the subject of a criminal indictment against the negligent person, whereby a penalty is exacted from him to be applied for the benefit of the heirs, widow, or next of kin of the deceased person.³ Moreover, the action of tort for personal injuries is in many States made to survive, contrary to the rule of the common law.⁴

SECTION II.

COMMON-LAW ACTIONS BY ONE FOR INJURY TO ANOTHER.

§ 8. **Generally: When Such Actions will lie.** — The common law recognizes certain cases in which one person having been injured by the fault or negligence of another, a third person may be entitled to recover, in his own behalf, the damage which he has suffered by reason of such injury. Such cases are (1) where the plaintiff was entitled to the services of the injured person, of which services he has been deprived by the fault of the defendant, (2) where the plaintiff, by the defendant's act, has lost the society of injured person, to which the law as in the case of husband and wife has given him a certain peculiar claim and right, and (3) when the plaintiff, being charged with the duty of supporting or providing for the injured person, has by the defendant's fault been put to extraordinary and necessary expense in the care or cure of such person. It is apprehended that, in order to entitle one person to recover damages for an injury to another, the case must be included in one of the classes thus specified.

¹ See §§ 217 *et seq.*, *post.*

² See § 24, *post.*

² See §§ 21 *et seq.*, *post.*

⁴ See §§ 17 *et seq.*, *post.*

§ 9. **Measure of Damages.** — In this class of cases the only measure of damages is the loss actually suffered by the plaintiff, and neither the pecuniary loss, the bodily injury, nor the mental anguish, suffered by the injured person, are to be taken into account.¹ So it was held in an action of trespass to recover damages caused to the plaintiff by an assault and battery upon his child or servant, — that exemplary damages could not be recovered although the assault was indecent, or otherwise committed under circumstances of great aggravation.² But the jury may give damages for the loss of services not only before action brought, but afterwards down to the time when it appears in evidence that the disability may be expected to cease, a like rule applying in such a case as would obtain had the action been brought for an injury to the person of the plaintiff.³ But the weight of authority is in favor of the rule that damages are not to be recovered which accrue after the death of the injured person.⁴

(a) *For Injury to Servant.*

§ 10. **Lies for Loss of Service.** — It is an ancient rule of the common law that if a servant suffer injury by the negligent

¹ Long v. Morrison, 14 Ind. 595.

² Whitney v. Hitchcock, 4 Denio, 461.

³ Hodsoll v. Stallebrass, 11 Ad. & El. 301. "Where the action is maintainable on the ground of the loss of services, then both by the law of England and this country, the parent may claim indemnity, not only for the actual loss of services to the time of the trial, but also for any loss of services during the child's minority, which in the judgment of the jury . . . will be sustained, and for the expenses necessarily incurred by the parent in the cure and care of the child in consequence of the injury." Cuming v. Brooklyn City R. R., 109 N. Y. 95. Under a statute providing that "every owner or keeper of a dog shall forfeit, to any person injured by such dog, double the amount of damage sustained by him," it was held that the owner of a dog which had injured a minor child so that by reason of the injury the parent had lost the child's services and been put to expense for his cure, was liable to the parent for double the amount of damages thus sustained by him. McCarthy v. Guild, 12 Met. 291. This was upon the ground that the words of the statute intended to include the case of all persons injured by a dog either in their persons or property.

⁴ See § 16, *post*, notes and cases cited.

or wilful act of a third person, and is thereby rendered incapable of performing the service to which he is bound, the master may have an action in his own name, for such loss of service, against the person causing the injury.¹ It was said that in such cases "the master has not any damage . . . but by means of a *per quod*, viz., *per quod servitium*, etc.; *amisit*; so that the original act is not the cause of his action, but the consequent upon it, viz., the loss of his service, is the cause of his action; for . . . if the master doth not lose the service of his servant, he shall not have an action."² The right to recover depends upon the principle that the master has by his contract acquired a property in the labor of the servant, of the enjoyment of which property the act of the defendant has deprived him.³ Ordinarily, at common law, while the remedy of the servant for the injury received by him would be in trespass or case, according as the injury was direct or consequential, the master's remedy for the loss of the services of the servant would be in an action of trespass on the case, and where the master sued in the latter form of action for the loss of services of his servant arising from an accidental collision with the defendant, it was held that the action was maintainable and the damage not too remote, although case and not trespass would have been the proper remedy had the servant been the plaintiff, the injuries being not direct, but consequential.⁴

§ 11. **So although a Contract between the Servant and the Defendant.** — The rule stated obtains although the defendant and the person injured stand to each other in the relation of contracting parties, and the injury sued for arises from the defendant's negligence in carrying out his contract with the injured person, for the tort sued for does not consist in the breach of the contract, but in the breach of a public duty im-

¹ Bac. Ab. Master & Servant, O.; Reeves, Dom. Rel. 376; 1 Bl. Com. 429; Pooley v. Osborne, cited 5 Co. 108 and 10 Co. 130; Mary's Case, 9 Co. 113.

² Mary's Case, *ubi supra*.

³ 3 Bl. Com. 142. See Hall v. Hollander, 4 B. & C. 660.

⁴ Martinez v. Gerber, 3 Scott, N. R. 386, 3 M. & G. 88.

posed by the common law.¹ Thus where the defendant was a common carrier of passengers, and the plaintiff's apprentice was lawfully on the defendant's car, for hire paid by the apprentice in the absence of his master, and by reason of the defendant's negligence in carrying the apprentice, he was injured and the plaintiff thereby lost his services; it was held that the facts disclosed a ground of action in behalf of the master, for the loss of service. The court said: "Even if the contract . . . were held to have been made with the apprentice alone and in his own right, it would not exclude liability in tort for injuries caused by the negligence of the defendant; and upon that liability an action may be maintained by any one who has suffered damage by means thereof. The degree of care required of the defendant, and thus the question whether there was any liability in tort, might be affected by the existence of the relation of contract between the defendant and the person injured. But a tort, not consisting merely in a breach of the contract, being proved, the right to recover for the damages caused must be governed by the general rule of law; and under that rule, will be determined by the nature of the injury, and of the right or interest injuriously affected."²

¹ 3 Bl. Com. 142. See §§ 3, 4, *ante*.

² *Ames v. Union Railway*, 117 Mass. 541; and see *Marshall v. York, Newcastle & Berwick Railway*, 21 L. J. (N. S.) C. P. 34; 7 El. & E. 519. In this case it was held that a servant travelling with his master on a railway might have an action against the railway company for the loss of his luggage, although the master took and paid for the servant's ticket, the liability of the railway company in such a case being independent of the contract. Jervis, C. J., said: "It was admitted . . . that if the plaintiff, instead of losing his property, had broken his leg, he could have had an action for his personal suffering, and his master could have sued for his loss of service. But in what respect could the plaintiff have had an action for his personal suffering? Not because there was a contract between him and the company, but by reason of a duty irrespective of the contract." Williams, J., concurred and said: "The current of cases . . . establishes that an action like this is to be regarded as an action of tort against the defendants as carriers, on the custom of the realm." And it was held unnecessary to allege or prove a contract. For the application of the general rule in actions against carriers of merchandise, see *Pozzi v. Shipton*, 8 A. & E. 963, and cases cited. The principle upon which the decision in the case, *Ames v. Union Railway*, *supra*,

depends, namely, that the action of tort for personal injuries exists independent of any existing contract relation between the defendant and the injured person, has already been considered, §§ 3-6, *ante*, and is laid down with great elaboration in the case of *Bretherton v. Wood*, 6 Moore, 141, 3 Brod. & B. 54, as cited § 5, *ante*. But upon a state of facts very similar to those existing in *Ames v. Union Railway*, the court in *Alton v. Midland Railway*, 19 C. B. (N. S.) 213, held a rule contrary to that laid down in the Massachusetts case, and apparently opposed to the doctrine of *Bretherton v. Wood*. In *Alton v. Midland Railway*, it was held that an action would not lie against a carrier of passengers for hire at the suit of a master for personal injuries sustained, through the carrier's negligence, by his servant, whose services were thereby lost; the contract for conveyance being between the servant and the carrier. It did not appear that the servant was travelling upon the master's business, in the line of his regular service, or that the consideration for his conveyance was paid by the master. The case was treated as one of novel intention, and was argued and discussed by the court with great elaboration. The court considered that the defendants' liability for the injury caused to the servant arose solely out of the breach of contract between itself and the servant, and that, the master and the defendant not being in privity, the master could not recover. Erle, C. J., said: "I am well aware that there are many cases in which a plaintiff may, at his option, seek redress either by declaring *ex contractu* or *ex delicto*, and that there are certain advantages, which are incidental to the form of procedure, to be obtained from adopting the latter form. But where it is necessary to resort to the substance of the cause of action, the distinction between the two has been constantly maintained." Willes, J., said: "It must be admitted . . . that a long series of authorities has established that a master may sue for loss of services caused by a pure wrong or trespass to his servant, as, by beating him. On the other hand, it is indisputable that no such action has ever been sustained in a case in which the injury to the servant was not actionable in respect of the civil wrong, but only in respect of a duty arising out of and founded upon a contract with the servant. The liability of the defendants . . . is of the latter kind." The court does not overrule, neither does it appear clearly to distinguish the case of *Bretherton v. Wood*. But it is obvious that the two cases are inconsistent, since the opinion in *Alton v. Midland Railway* rests wholly upon the assumption that the duty of the carrier to the passenger arises solely out of the contract of transportation — a doctrine expressly denied in *Bretherton v. Wood*. The court, in *Alton v. Midland Railway*, cite several cases in support of the doctrine laid down, which upon examination seem to be distinguishable or not in point. In *Winterbottom v. Wright*, 10 M. & W. 109, it appeared that A. had contracted with the Postmaster-General to provide a mail coach to convey the mail bags along a certain route, and B. and others contracted to horse the coach along the same line, and hired C. to drive the coach. It was held that C. could not maintain an action against A. for injuries sustained

by him while driving the coach, by its breaking down by reason of latent defects in its construction. The case was held to be one of the class in which the wrong arises merely out of the breach of the contract, in which cases, whether the form of the action be tort or contract, the party who made the contract alone can sue. And as the defendant's contract was made with the Postmaster-General only, and the plaintiff was in no privity with the defendant, the action was defeated. It is apparent in this case, that the relation of common carrier and passenger could not be supposed to exist, as between the plaintiff and the defendant; therefore, that defendant could not be charged with the breach of a public duty, and that, the action could not be supported, as by a servant against his master, for the reason that the contract relation of master and servant did not exist between the parties. Had such relation existed, it is apprehended that the breach of the duty owed by the master to the servant, to provide suitable means for doing the work contracted to be done, might well be the ground of an action sounding in tort. In *Tollit v. Sherstone*, 5 M. & W. 283, 289, Maule, B., observed: "It is clear that an action of contract cannot be maintained by a person who is not a party to the contract; and the same principle extends to an action of tort arising out of a contract." But this was an action in trover for the conversion of a horse, and it is evident that the defendant's act did not necessarily include the breach of a public duty. In *Collis v. Selden*, 3 C. P. 495, a declaration alleging that the defendant negligently hung a chandelier in a public house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the plaintiff being lawfully in the public house, the chandelier fell upon and injured him, was held bad on demurrer on the ground that the declaration did not disclose any duty by the defendant towards the plaintiff. Bovill, C. J., said: "No duty of a public nature is shown. Assuming that for this purpose a public house is to be treated as an inn, which . . . I think we can hardly assume, it is not shown in what capacity the plaintiff was there. . . . We cannot infer that there was anything in the nature of a public nuisance. . . . No contract is alleged. . . . I find nothing equivalent to fraud or misrepresentation." The clear inference to be drawn from the case, as reported, would seem to be that had the declaration set forth a breach of public duty, as to a plaintiff lawfully in the public house, it would have been supported. There is nothing in the case to support the doctrine that torts for injuries arise solely out of a breach of contract between the parties, when such a contract as to the subject-matter exists. In the case of *Everard v. Hopkins*, 2 Bulst. 332, it appeared that the plaintiff had contracted with the defendant, a physician, to cure the plaintiff's servant, and that the defendant was negligent in doing what he had contracted to do, so that the plaintiff lost the services of the servant. An action for the loss of service was supported. The contract being between the defendant and the master of the injured servant, the case was admitted not to touch the question raised in *Alton v. Midland Railway*. A scrutiny of the doctrine laid down in *Alton v. Midland Railway* makes ap-

parent certain difficulties in its application as a general rule to a variety of cases. Thus if the liability of the carrier for injuries negligently inflicted by him upon the passenger arises solely out of the contract of transportation, it would seem that the carrier might, by the contract, limit his own liability for accidents. But the weight of authority in the United States is in favor of the rule that the carrier cannot so limit his liability. See *Grand Trunk Railway v. Stevens*, 95 U. S. 655, and other cases cited, § 116, *post*. It is to be observed however that the English courts, generally, are disposed to hold that the carrier may limit his liability by the terms of his contract. See *Gallin v. London & Northwestern Railway*, 44 L. J. Q. B. 89, and cases cited §§ 116, 117, *post*. Again it would seem, under a close application of the rule, that the same negligence which might under one set of circumstances charge the carrier in an action by the master, would under another set of circumstances defeat the action. Thus, if the servant having purchased a ticket at a railway station, is going to take his place in the train by the direct and proper route over the station platform in which the carrier has permitted a dangerous hole or pit-fall to exist after sufficient notice, and the servant is injured by falling therein; while the servant may recover against the carrier for the injuries caused by the defendant's fault, it would seem that the master would be barred from recovering for the loss of service, since the contract for transportation was complete, and the servant had become a passenger of the carrier. (See § 114, *post*.) On the other hand, if the servant had entered the platform from the street on his direct way to the ticket office to purchase his ticket, and was injured by falling into the hole, it would seem that both the servant and the master might recover as against the carrier, there being no contract to which to refer the carrier's breach of duty. For it is to be noted that the English courts recognize the general rule that the master may recover damages occasioned to him by the injury to his servant, *Alton v. Midland Railway*, *supra*; and although some expressions in that case would seem to imply that recovery is to be limited to cases where the injury was malicious, as by beating the servant, no just ground is stated for thus narrowing the rule, and the broad rule has been applied in other English cases. See *Martinez v. Gerber*, 3 Scott, N. R. 306, cited and approved in *Alton v. Midland Railway*, *supra*. The reasoning seems at least doubtful which holds that an act may be a tort sufficient to support an action, there being no contract between the parties, but if there be a contract, that the act is to be referred to a breach of that contract, and so lose the incidents which would attach to it had there been no contract. The doctrine that the duty of a carrier to observe the best precautions in respect of the safety of his passengers is imposed by the law in respect of all persons who intrust themselves to him as passengers, and that this duty is absolute, and exists independent of the contract, being founded upon the principle which requires every person to manage his property and business so as not to injure another, finds further support in the cases which hold that although the carrier transport a person gratuitously, he may still be liable

(b) *For Injury to Child.*

§ 12. **For Loss of Service.**—Like rules to those already stated are applied in actions by a parent for injuries to his child when brought for the loss of the child's services; because in such cases the right of action is founded not on the natural relation of parent and child, but on the assumed relation of master and servant, and the declaration in such a case must aver the loss of service.¹ The early cases held that to support the declaration for loss of services it must appear that the child was capable of performing acts of service;² but it is apprehended that a less strict degree of proof may be insisted on upon this point when the infant was nearly of adult age at the time of the injury complained of; and in the United States there are cases which would seem to hold that the duty of the parent to support the child, and the child's duty of service, are correlative rights; and that if the latter duty is rendered impossible of performance by fault of a third party, the right of action accrues for the past and prospective earnings of the child during its minority, whether the child be actually capable of service or not.³ But if the duty of support does not exist, as between the mother and her infant child, then the duty of service is not to be inferred, but must be proved affirmatively, as in cases arising from an injury to a servant. It has been held that a mother not being bound to the duty of maintenance of her children is not entitled to the correlative right of service, and the relation of mistress and servant cannot be constituted between them only as it may be

for negligence whereby such person is injured; (see § 117, *post*,) for it cannot be said, in such a case, that liability arises out of any subsisting contract resting upon a consideration. The doctrine of *Alton v. Midland Railway* has been approved in Pennsylvania, see *Fairmount & Arch St. Railway v. Stutler*, 54 Penn. St. 375, 379, but the expression of approval in this case is *obiter dictum*, the plaintiff having been held incompetent to sue as not having a sufficient interest to support her claim for alleged loss of service.

¹ See *Wotton v. Hunt*, T. Ray. 259.

² *Hall v. Hollander*, 7 Dowl. & R. 133. See *Fores v. Wilson*, Peake's N. P. C. 55; *Jones v. Brown*, Peake's N. P. C. 233, 1 Esp. 217.

³ See *Fairmount & Arch St. Railway v. Stutler*, 54 Penn. St. 375; *Netherlands, &c. Co. v. Hollander*, 20 U. S. App. 225.

constituted between strangers in blood, save that less evidence, perhaps, may be sufficient to establish it.¹ But, since it is the tendency of the modern decisions to give to a widow, left with minor children, who keeps her family together and supports herself and them, with the aid of their services, much the same control over them and responsibility for them as are given to and imposed upon a father, it has been considered that when a minor child lives with its mother who is a widow, and the child is supported by the mother, and works for her as one of the family, the mother is entitled to recover for the loss of the services of the child, as such, as well as for expenses reasonably incurred in the care and cure of the child.²

§ 13. **For Expense in curing Child.** — It appears to be uniformly held in the United States that although an infant child be too young to render any service to his parent, yet if he be injured by a wrong-doer the parent may recover, as the consequence of such injury, his expenses necessarily incurred in the care and cure of the child, he being legally liable for its support and maintenance.³ This rule was applied where the child had been kicked and injured by the defendant's mare.³ Where the infant, engaged in his father's service, was bitten by a vicious dog belonging to the defendant, the court said: "Even if the child was of very tender years, so as to be incapable of rendering any useful services, the action would doubtless lie if averments were made of consequential injury by expenses caused in healing the wounds."⁴ The mere incon-

¹ *South v. Denniston*, 2 Wright, 477; *Leech v. Agnew*, 7 Barr, 21; *Fairmount & Arch St. Railway v. Stutler*, 54 Penn. St. 375.

² *Horgan v. Pacific Mills*, 158 Mass., 402.

³ *Dennis v. Clark*, 2 Cush. 347.

⁴ *Durden v. Barnett*, 7 Ala. 169. The rule on this subject does not seem to be settled definitely in England. In *Wotton v. Hunt*, T. Ray. 259 (1679), a verdict in favor of a parent seeking to recover against the defendant, who had carelessly injured the plaintiff's infant son, was supported; but the case is criticised by Sir Thomas Raymond, "it not being laid *per quod servitium amisit*; but the child himself ought to have brought the action." In *Hall v. Hollander*, 7 Dowl. & Ry. 133, 4 Barn. & Cr. 660 (1825), the declaration alleged both loss of services and the expenditure of large sums of money in curing the infant. The proof

venience and trouble caused to others of the plaintiff's family by the injury to the child are not grounds for damages.¹

(c) *For Injury to Wife.*

§ 14. **Lies for Loss of Services and Society.** — So it is everywhere held that a husband may maintain an action for loss which he has sustained by reason of a personal injury negligently or wilfully inflicted upon his wife. The declaration generally sets forth the husband's loss of his wife's society, or of her services, or both, and also the expenses necessarily incurred by him in consequence of the injury inflicted upon her. And although the husband be living at a distance from his wife, there is no doubt that he may recover in this form of action any sums of money which he has been obliged by law to pay for care and attendance upon the wife during her sickness.² That an action for the husband's loss of the society of his wife might be maintained by him without joining the wife as a party seems first to have been held in an early case in which it was considered that "in an action brought for the battery of the wife she need not be joined, as the loss was only of her company, which pertained alone to the husband, for which he should have his suit, as the

failed as to the first allegation; and it appeared that the infant might have been cured without expense to the father. It was held that the action as brought could not be maintained; but it was intimated that a declaration might be framed with averments that the father, being obliged to maintain the child, and having no means of providing medical assistance, had necessarily incurred expense in and about the child's cure, so as to enable him to recover. But in *Grinnell v. Wells*, 7 M. & G. 1033, 8 Scott, N. R. 741 (1844), Tindal, C. J., suggested doubts whether such an action could be maintained. The right of the plaintiff to recover in such cases being founded upon his obligation to support his infant child under all circumstances, which obligation is recognized by the American law, the doubt upon the subject in England would seem to arise out of the doubt which exists there as to the parent's obligation under the common law. See the subject elaborately discussed by Metcalf, J., in *Dennis v. Clark*, 2 Cush. 347, 353.

¹ *Woeckner v. Erie El. Motor Co.*, 182 Penn. St. 182.

² *Dennis v. Clark*, 2 Cush. 347. As to the effect of contributory negligence to defeat the husband's action, see § 108, *post*.

master shall have for the loss of his servant's service." ¹ It is clear that, at common law, damages for injuries sustained by the wife and for the husband's loss of the services and society of the wife cannot be recovered in the same action, since, although the respective rights of action arise out of the same injury, the damages are distinct.² The weight of authority is in favor of the rule that at common law an action by a husband for the loss of his wife, who has been killed by the negligence of a third party, can only be maintained where some time intervenes between the injury and the death, during which the husband may have suffered the loss of her services and society, and incurred expense and endured mental distress on her account.³

SECTION III.

STATUTORY ACTIONS IN BEHALF OF DECEASED PERSONS OR THEIR REPRESENTATIVES.

§ 15. **No Action for Death at Common Law.** — At common law, the death of a human being could not be complained of as an injury in a civil court, and, therefore, could not be made the ground of an action for damages.⁴ The modern authorities agree that actions for injuries to the person do not survive unless by the force of a statutory provision,⁵ and

¹ *Guy v. Livesey*, Cro. Jac. 501; and see *Hyde v. Scysson*, Cro. Jac. 538; *Young v. Pridel*, Cro. Jac. 89.

² *Fink v. Campbell*, 37 U. S. App. 462.

³ *Green v. Hudson River R. R.*, 28 Barb. 9, 2 Keyes, 294. Where the injury to the wife caused her miscarriage, it was held error to permit the jury to allow damages for loss of offspring. *Butler v. Manhattan R. R.*, 143 N. Y. 417.

⁴ Per Lord Ellenborough, in *Baker v. Bolton*, 1 Camp. 493.

⁵ *Safford v. Drew*, 3 Duer, 627; *Quinn v. Moore*, 15 N. Y. 436; *Green v. Hudson River R. R.*, 28 Barb. 9; *Buel v. New York Central R. R.*, 31 N. Y. 314; *Miller v. Umberhower*, 10 S. & R. 31; *Eden v. Lexington & Frankfort R. R.*, 14 B. Mon. 204; *Worley v. Cincinnati, Hamilton & Dayton R. R.*, 1 Handy (Ohio), 481; *Carey v. Berkshire R. R.*, *Skinner v. Housatonic R. R.*, 1 Cush. 475; *Indianapolis & St. Louis R. R. v.*

the weight of authority is in favor of the rule that actions brought to recover damages accrued to the plaintiff by reason of the wrongful killing of a third person, after the death of such person, as for the loss of services or society, cannot be supported. Thus where the action was brought by a husband for injuries received by his wife by the fault of the defendant, by reason of which she died a month thereafter, the declaration alleged that "by means of the premises the plaintiff had wholly lost and been deprived of the comfort, fellowship, and assistance of his wife, and had from thence suffered great grief, vexation, and anguish of mind." It was held that the jury could consider only, as ground of damage, the loss to the plaintiff of his wife's society, and the distress of mind he had suffered on her account from the time of the accident to the time of her death.¹ And this doctrine was affirmed in a later case in which it was held that a master could not maintain an action, whether for loss of services or for funeral expenses, of a servant who had been instantly killed by the defendant's fault.²

Stout, 53 Ind. 143; *Dennick v. Central R. R. of New Jersey*, 103 U. S. 11; *Steamer Harrisburg v. Rickards*, 119 U. S. 199. Where the action is for a death occurring in another State, the presumption is that the common law on the subject prevailed in such other State and the right to recover will be determined by that law. *Jackson v. Pitts. C. C. & St. L. R. R.*, 140 Ind. 241. It is held that where a husband brings suit for injuries inflicted on his wife, and dies pending the suit, the action, so far as it is for the loss of the services of the wife, and for expenses incurred by reason of her injury, survives to the personal representatives of the husband, as these are a pecuniary loss diminishing his estate, but that the right to damages for the loss of the society of the wife does not survive. *Cregin v. Brooklyn Crosstown R. R.*, 83 N. Y. 595. So in *James v. Christy*, 18 Mo. 162, it was held that an action by a parent for damages for the loss of his son, who was killed by the negligence of the defendant, did not abate by the death of the plaintiff, but survived to his personal representative; but that the right of action would be limited to the actual damage occasioned to the plaintiff by the loss of the services of his son.

¹ *Baker v. Bolton*, 1 Camp. 483.

² *Osborne v. Gillett*, L. R. 8 Exch. 88, by Kelly, C. B., and Piggott, B., Bramwell, B., dissenting. See cases cited, *supra*, and § 16, *post*. "To a certain extent the doctrine expressed in the maxim '*actio personalis moritur cum persona*' has been qualified. Under the Statute of Edward

§ 16. **Contrary Authority.** — Whether or not the reason of the general rule stated may seem to include actions brought to recover damages arising from the death, by the defendant's fault, of a third person, the rule that such actions are to be so included seems to be settled by the weight of authority. But there are important cases which hold a contrary view. In Michigan, it was considered that the general rule had no application to an action brought by a master for the loss of the services of his servant, or by a husband for the loss of the services of his wife; since, in these cases, the right of action could not have become vested in the servant, or the wife, respectively, during the life of either of them, and so could not have been lost by the death, so that there was no question of survivorship. It was further considered that the damages assessed in such a case must be limited to the plaintiff's actual loss of services [or society], and to expense incurred by the plaintiff in the attempted cure of the injured persons; and that the mental sufferings, endured either by the deceased persons or the plaintiff, were not to be considered in the estimate of damages.¹ So it was held by Dillon, J., that where a servant was killed instantly by the wrongful act of the defendant, the master might recover for the loss of service; and, further, if death did not immediately follow the injury, that the master was not limited in damages to the interval between the injury and the death. The cases holding the contrary view are fully reviewed and said to rest upon the *nisi prius* decision, in 1808,

III. it has in many cases been held that where the cause of action, whatever its form may be, is in respect of a tortious impairment of the personal estate, such action may be maintained by the personal representative. But none of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his life time some expenditure of money in consequence of the personal injury." Per Denman, J., in *Pulling v. Great Eastern Railway*, 9 Q. B. D. 110. While the English common law does not permit the action after death, the civil law and the Scotch law permit it, and damages may be awarded to the relations of the person killed as a "*solatium*." See Erskine's Institutes (by Ivory), 592 n. 13; Bell's Principles of the Law of Scotland, 4th ed. 749; Dictionary of Decisions, vol. 31, p. 13903.

¹ *Hyatt v. Adams*, 16 Mich. 180, by Christianey and Campbell, JJ.

by Lord Ellenborough in *Baker v. Bolton*,¹ and the court said: "In view of the tenor of the cases, some of which, however, are not well considered, . . . it requires some courage to disregard them; but as the rule they assert is incapable of vindication, and cannot be shown to be deeply rooted in the common law, my judgment is that I am free to decide the rights of the parties without applying it."²

¹ See § 15, *ante*.

² *Sullivan v. Union Pacific R. R.*, 3 Dillon, 334 (1874). This case was overruled, after careful consideration, in *Steamer Harrisburg v. Rickards*, 119 U. S. 199, and see *Sullivan v. Union Pacific R. R.*, 3 McCrary, 301 (1880), in which case McCrary, J., held that in the absence of a statute damages cannot be recovered by a father from a railroad company for causing the death of a minor son. In New York, in the comparatively early case of *Ford v. Monroe*, 20 Wend. 210, the plaintiff was permitted to recover damages for the defendant's negligence in driving a carriage over the plaintiff's son, an infant ten years old, thereby killing him. One ground of damage relied on was the loss of the son's service, and the jury was instructed that the plaintiff might recover therefor from the time the son was killed to the time he would have become of age, had he lived. Neither at the trial, nor on the motion for a new trial when argued in bank, was the question raised as to the legal right of the plaintiff to recover other damages in the premises. In *Allsop v. Allsop*, 5 H. & N. 534, 538, Pollock, C. B., says, that the case of *Ford v. Monroe* is opposed to the universal practice of the law in England. But his criticism is founded upon the objection that the case gives "fanciful or remote damages" such as do not "fairly and naturally result from the wrongful act itself." The Chief Baron does not consider directly the question of the survival of the action involved in *Ford v. Monroe*. But the latter case is distinctly overruled in the leading case of *Green v. Hudson River R. R.*, 28 Barb. 9, affirmed 2 Keyes, 294, a case which expresses the present law in New York, and in which the whole question is exhaustively considered and the broad application of the rule stated in the text adopted. See however *obiter dicta* contained in *Pack v. Mayor of New York*, 3 N. Y. 489, and *Lynch v. Davis*, 12 How. Pr. 323, in which it would seem that the doctrine of *Ford v. Monroe* was approved. In *Cross v. Guthery*, 2 Root (Conn.), 90 (1794), it was held in a brief opinion that an action for damages would lie at common law in favor of a husband as against a surgeon for unskillfully performing a surgical operation upon the wife, of which she died in about three hours, but this case is ignored and the general rule held in *Goodsell v. Hartford & New Haven R. R.*, 33 Conn. 51. In *Plummer v. Webb*, 1 Ware (Maine), 75, it was held that an action, being brought before its death for the loss of the services of a child, did not abate by the death of the child, but survived to the parent.

(a) *Survival of Actions.*

§ 17. **Provided for by Statute.** — Statutory provisions for the survival of actions for personal injuries now form a part of the law of most if not all of the States. In Massachusetts, it was early provided that “the action of trespass on the case, for damage to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended, by or against his executor or administrator, in the same manner as if he were living.”¹ Later, it was provided that “in addition to the actions which survive by the common law, the following shall also survive; actions . . . of tort for assault, battery, imprisonment, or other damage to the person, . . . or for damages to real or personal estate.”² Under these statutes, it is held that an action for injury to the person will survive as well when the wrong is occasioned by the defendant’s fraud as when it is done by force, since in such cases the action is not for the deceit alone but for the injury caused by the deceit. The nature of the damage sued for, not the nature of its cause, determines whether the action survives. So it was held under the statute above cited, that an action for deceit in letting a dwelling-house infected with diphtheria which caused injury to the person of the plaintiff survived to the plaintiff’s representative.³

The rule as stated in the text (§ 15, *ante*) is held in admiralty, see *Steamer Harrisburg v. Rickards*, 119 U. S. 199, where the question is discussed in an elaborate opinion, and with a full citation of the authorities, by Waite, C. J. To the same point, see *The Alaska*, 130 U. S. 201, but compare *Holmes v. O. & C. Railway*, 5 Fed. Rep. 75.

¹ St. 1842, c. 89, § 1.

² Pub. Sts. c. 165, § 1. In Pennsylvania, under P. L. 674, if one who has begun an action for personal injuries dies before the case is called for trial, his executor or administrator may be substituted as plaintiff. *Birch v. Pittsburgh, C. C. & St. L. R. R.*, 165 Penn. St. 339.

³ *Cutter v. Hamlen*, 147 Mass. 471, commenting on *Cutting v. Tower*, 14 Gray, 183. In Michigan, under 3 How. St., § 7397, which provides for the survival of actions for negligent injuries to the person, an action against a physician for negligent malpractice survives as against his executors. *Norris v. Circuit Judge*, 100 Mich. 256.

§ 18. **No Action unless Party survives the Injury.** — Since the statute supposes the person deceased to have been once entitled to an action for the injury which caused his death and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising his right; it follows that his personal representative cannot maintain the action when the death of the injured person was instantaneous. In other words, the cause of action must accrue during the lifetime of the injured person, and if there was no time during his lifetime when the action could accrue, it cannot be maintained. And in the absence of evidence that the injured person survived the accident, it is to be held, as matter of law, that the action cannot be supported.¹ Where a woman between four and five months advanced in pregnancy, by reason of falling upon a defective highway, was delivered of a child which survived its premature birth only a few minutes, it was held that such child was not a "person," within the meaning of a statute, for whose loss of life an action might be maintained against a town by his administrator.²

§ 19. **Need not be Conscious nor live more than an appreciable Length of Time.** — The mere right of action does not depend upon the degree of consciousness, intelligence, or mental capacity remaining in the injured person after the injury is received.³ The sole question is whether the person lived after the act was done which constitutes the cause of action. The law contemplates a precise moment of time which separates life from death, and the right may accrue by operation of law to one *in extremis* when it requires no act, or assent, or even consciousness on his part.⁴ Nor is it material that it is physically impossible for the injured person

¹ *Kearney v. Boston & Worcester R. R.*, *Mann v. Same*, 9 Cush. 108; *Hansford v. Paine*, 11 Bush, 380; *Hodnett v. Boston & Albany R. R.*, 156 Mass. 86.

² *Dietrich v. Northampton*, 138 Mass. 14.

³ *Hollenbeck v. Berkshire R. R.*, 9 Cush. 478; *Mulchahey v. Washburn Car-Wheel Co.*, 145 Mass. 281.

⁴ *Bancroft v. Boston & Worcester R. R.*, 11 Allen, 34.

during the time he survives to bring an action for the injury. Thus where the person received an injury which caused him to become immediately insensible and he so continued till his death, which occurred in fifteen minutes, it was held that the action survived to his administrator. Where the only evidence that the intestate survived the accident was the fact that there appeared certain spasmodic muscular contractions of the body, such as often attend violent death, it was held that there was no evidence, sufficient to be submitted to the jury, that the intestate survived the injury.¹

§ 20. **Rule of Damages.** — In these cases, as the death itself does not furnish the ground of action, it is evident that the action is only to be maintained for such damages as were sustained by the injured person during the time that he survived,² as for expense and loss incurred before death by reason of the accident, and also for the bodily pain and mental suffering of the deceased person. But it is for the plaintiff to show that the intestate suffered in body or mind, and where the injured person becomes unconscious at the instant of receiving the injury and so remains until death, there is no ground for the recovery of damages for mental or, it seems, for physical suffering.³ It is held that damages for death caused by negligence are not to be reduced by the amount of insurance on the life of the deceased.⁴

(b) *Action for Death.*

§ 21. **Created by Statute. Nature of.** — The statutes already referred to provide for the survival of the common-law action to be prosecuted by the personal representative of the person whose injury, received through the negligence of the defendant, has caused his death, and who, had he survived, would

¹ *Kearney v. Boston & Worcester R. R.*, 9 Cush. 108.

² *Bancroft v. Boston & Worcester R. R.*, 11 Allen, 34; *Goodsell v. Hartford & N. H. R. R.*, 33 Conn. 51; *McElligott v. Randolph*, 61 Conn. 157.

³ *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90; *Moran v. Hollings*, 125 Mass. 93; *Earl v. Tupper*, 45 Vt. 275; *Muldowney v. Illinois Central R. R.*, 36 Iowa, 462. The rule may be different in those jurisdictions where exemplary damages are allowed.

⁴ *Coulter v. Pine Township*, 164 Penn. St. 543.

have been entitled to prosecute the action in his own behalf. But the statute law has created another class of actions, to be prosecuted by the personal representative of the deceased in behalf of, and to recover the damages occasioned to, the relations of the deceased person by reason of his death. Such actions do not depend upon the survival of the deceased person after the injury,¹ and are governed by a rule of damages, different from that which obtains in actions which survive. It is said that "these statutes have introduced a principle wholly unknown to the common law, namely, that the value of a man's life to his wife or next of kin constitutes, with a certain limitation as to amount, a part of his estate, which he leaves behind him to be administered by his personal representatives," and "though the action can be maintained only in the cases in which it could have been brought by the deceased if he had survived, the damages nevertheless are given upon different principles and for different causes."² And it is held, apparently with sound reason, that when the death occurs two causes of action may arise, one in favor of the decedent under the statute providing for the survival of such actions, the other founded on his death under the statute providing for such actions, and being for the benefit of the relations named in the statute. Both actions may be prosecuted by his personal representatives, but the damages are given for different purposes.³

¹ Price v. Richmond & D. R. R. 33 S. C. 556; Reed v. Northeastern R. R., 37 S. C. 42.

² Per Denio, J., in Whitford v. Panama R. R., 23 N. Y. 468.

³ Needham v. Grand Trunk R. R., 38 Vt. 294; Bowes v. Boston, 155 Mass. 344. As an action brought for personal injuries suffered by the plaintiff at common law abates by his death, it follows that the pendency of such an action will not defeat an action brought, under a statute, by the personal representatives of the plaintiff, for his death. Indianapolis & St. Louis R. R. v. Stout, 53 Ind. 143. It seems that where the statute provides that the amount of the fine, or of the damages assessed in a civil action, "shall go to" the heirs, or other parties named in the statute, the right of action may be assigned, *pendente lite*, by the parties having the beneficial interest in it, and such assignment will not defeat the action. State v. Boston & Maine R. R., 58 N. H. 510. A statute empowering married women to hold and transfer property independently, and to carry on a separate business, does not abrogate the right of a husband to main-

§ 22. **General Form of Statute.** — It is provided by the statute 9 & 10 Victoria, c. 93, sec. 1, (1849), "Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof; then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amounts in law to felony." The second section of the act provides that "every action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whose benefit such action shall be brought; and the amount so recovered, after deducting the cost not recovered from the defendant, shall be divided among the before-mentioned parties, in such shares as the jury by their verdict shall find and direct." The substance of this statute has been enacted in the legislation of each of the United States, and is applied to the District of Columbia. In some States, the statutes create a liability in certain special cases only as against persons or corporations by whose fault the death sued for has occurred. Thus in Connecticut it is provided "that if the life of any person being a passenger, or crossing upon a public highway in the exercise of reasonable care, shall be lost by reason of the negligence or carelessness of any railroad company, . . . or by the unfitness or negligence

tain the statutory action to recover damages for the death of his wife occasioned by the negligence of another. *St. Louis, &c. R. R. v. Henson*, 19 U. S. App. 169. It is held that, a statute giving a right of action for death to the "heirs or personal representatives" of the deceased does not limit the damages to the "community relation," in which the husband is the only heir of the wife; but that the word "heirs" is used in its common-law sense, and intends those who are capable of inheriting from the deceased person generally, without reference to the distribution of community property. *Redfield v. Oakland, &c. St. Railway*, 110 Cal. 277.

or carelessness of their servants or agents, such company shall be liable to pay damages not exceeding \$5,000 nor less than \$1,000, to the use of the executor or administrator of the deceased person, to be recovered by such executor or administrator in an action on the case . . . for the benefit of the husband or widow and heirs of the deceased person, one moiety thereof to go to the husband or widow and the other to the children of the deceased, but if there shall be no children, the whole to the husband or widow, and if no husband or widow to the heirs, according to the law regulating the distribution of personal estate.”¹ Under a statute giving personal representa-

¹ Rev. Sts. Conn. 1866, p. 202. See also Pub. Sts. Mass. c. 112, § 212; Acts of 1887, c. 270, §§ 2, 3, which creates a special liability as against employers. In New York, the statute provides that the action for death “shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they deem a fair and just compensation, not exceeding \$5,000, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person,” to be distributed among them under the statute governing the distribution of personal property. In Illinois, the statute, with a few immaterial changes in phraseology, is like the New York statute. Under this statute it is held in New York that the action may be maintained by the administrator of an infant who has no wife or family dependent upon him for support. *Quin v. Moore*, 15 N. Y. 432. In Vermont, the action for death is similar to that provided for by the New York statute in that it provides that the damages shall be distributed to the wife and next of kin of the deceased person as under the statute of distributions. In Indiana, it is provided that “where the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefore against the latter, if the former might have maintained an action had he lived for . . . the same act or omission. . . . The damages cannot exceed \$5,000, and must enure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property.” The right of action in that State thus seems to be made dependent upon the survival of the person injured after the injury (see § 18, *ante*), but it is brought as an independent action for the benefit of surviving persons named. Under this statute, it was held in *Long v. Morrison*, 14 Ind. 395, that the action being for loss of service by reason of malpractice which had

tives a right of action for benefit of the next of kin, a libel *in personam* may be maintained for damages for death caused by a negligent collision on navigable waters within the State.¹

§ 23. **Rule of Damages.** — Under the statutes already considered, it is evident that the damages are to be measured by the pecuniary loss suffered by the relations of the deceased person for whose benefit the action is brought, and that the damages suffered by the deceased person himself are not to result in the death of the plaintiff's wife, damages were to be assessed as from the act of malpractice to the death of the wife. The case was complicated by the consideration that the wife, had she survived, could not have brought action but by joining her husband, and it was held that the action as to the wife survived (notwithstanding that the statute prescribes the distribution of any damages recovered), and that, properly, the administrator of the wife should be joined with the husband as party plaintiff. But it seems to be well settled, that at common law the wife need not be joined as plaintiff in an action brought by her husband for the loss of her services and society. In the same State it is provided by the Code, § 27, that "a father, or in case of his death or desertion of his family, the mother may maintain an action for the injury or death of a child; and a guardian for the injury or death of his ward. . . . The damages shall enure to the benefit of the ward." See §§ 12, 13, *ante*. See *Fairmount & Arch St. Railway v. Stutler*, 54 Penn. St. 375. In New Jersey, the amount of damages is not limited, the statute providing that the "action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person." See § 26, *post*. In Kentucky, the statute provides that "if the life of any person . . . is lost or destroyed by the wilful neglect of another person or persons, . . . then the widow, heir, or personal representatives of the deceased shall have the right to sue such person or persons . . . and recover punitive damages for the loss or destruction of the life aforesaid." A statute giving foreign administrators an action for the recovery of "debts due their decedents" (Gen. St. Ky. c. 39, art. 2, § 43) confers no capacity to sue for the wrongful death of such decedent, although such power has been given to domestic administrators. *Maysville Street R. R., &c. v. Marion*, 59 Fed. Rep. 91; 8 C. C. A. 21.

¹ The Transfer, No. 4, 9 C. C. A. 521.

be taken into account,¹ nor are damages recoverable for the loss of the society of the deceased person.² The declaration or complaint should aver that those persons are in existence whom the statute names as to be benefited by the action, and that these have sustained a pecuniary loss by reason of the death of such person.³ It was held that in order to support the action under the English statute, 9 & 10 Vict. c. 93, for damages arising from death by negligence, such damages must be special; and that the action could not be supported to recover merely nominal damages; and it was further held that a verdict assessing as damages the funeral expenses and medical attendance of a child, paid by the father and administrator of the child, who brought suit, could not be supported. The statute provides, § 2, that in such actions "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit the action shall be brought."⁴

¹ *Needham v. Grand Trunk Railway*, 38 Vt. 294; *Telfer v. Northern R. R.*, 30 N. J. L. 198; *Donaldson v. Mississippi & Missouri R. R.*, 18 Iowa, 280; *Ohio & Mississippi R. R. v. Tindall*, 13 Md. 366; *Chicago v. Major*, 18 Ill. 349.

² *Pym v. Great Northern R. R.*, 4 B. & S. 396; *Tilley v. New York Central & H. R. R. R.*, 24 N. Y. 471; *Telfer v. Northern R. R.*, 30 N. J. L. 198; *Caldwell v. Brown*, 53 Penn. St. 453.

³ *Safford v. Drew*, 3 Duer, 627; *Blake v. Midland Counties Railway*, 21 L. J. Q. B. 233. Applying the principles stated in the text, it would seem that exemplary damages are not to be recovered in the action for death in those jurisdictions which admit such damages in other cases. See *Pennsylvania R. R. v. Henderson*, 51 Penn. St. 316; *Conant v. Griffin*, 48 Ill. 410; *Kansas Pacific R. R. v. Miller*, 2 Col. (T), 442. But in some States, as in Kentucky, California, and Texas, the recovery of such damages is provided for by the statute. See § 22, n.

⁴ *Dalton v. Southeastern Railway*, 27 L. J. (N. S.) C. P. 227; *Boulter v. Webster*, 11 L. T. (N. S.) 598. But see *Cleveland & Pittsburgh R. R. v. Rowan*, 66 Penn. St. 393. Under a statute providing that the damages to be recovered shall not exceed a certain amount, it is error to charge the jury that if they find for the plaintiff they shall assess damages in such sum. *Schleireth v. Missouri Pacific R. R.*, 96 Mo. 509, and see *King v. Missouri Pacific R. R.*, 98 Mo. 235. Only nominal damages can be recovered for the death of a brother, incapable of supporting himself by reason of habitual drunkenness, under a statute providing that the next of kin may recover for pecuniary injuries resulting from death by negligence. *North Chicago St. R. R. v. Brodie*, 156 Ill. 317.

§ 24. **Quasi Penal Actions.** — In some of the States the statutory action against a person or corporation for negligently causing the death of another partakes of the nature of a penal action. Thus it is provided in Massachusetts that “if by reason of the negligence or carelessness of a corporation operating a railroad, . . . or of the unfitness or gross negligence of its servants or agents while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger or in the employment of such corporation, is lost,” — the corporation shall “be liable in damages, not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of” his widow, children, or next of kin.¹ This and similar statutes provide for the recovery by an action, civil in form, of a penalty which under the provisions of former statutes might be recovered under a criminal indictment, and in Massachusetts, the executor has the option of selecting either form of proceeding. It is apprehended that a consideration of the difficulties commonly attending the enforcement of the criminal proceeding led the legislature to provide a simpler means of enforcing the statutory penalty. Where, as in Massachusetts, the words of the statute defining the civil and the criminal liability are the same,² like rules of interpretation are applied.³ Thus, in either case, the penalty is to be greater or smaller according to the degree of blame which attaches to the defendant, and not according to the loss sustained by the widow or heirs of the deceased.⁴ And in either proceeding the necessity of proving due care on the part of the deceased person is dispensed with.⁵

¹ Pub. Sts. Mass. c. 112, § 212.

² Ibid.

³ See § 25.

⁴ *Carey v. Berkshire R. R.*, 1 Cush. 475; *Commonwealth v. Eastern R. R.*, 5 Gray, 473; *Commonwealth v. Boston & Albany R. R.*, 121 Mass. 36.

⁵ See § 139, *post*.

§ 25. **Criminal Indictment.** — In some jurisdictions, the representatives of the deceased person have the option to pursue either a civil or a criminal remedy.¹ In others, the remedy by indictment may be pursued against certain persons only, as against the agents of the corporation the legal negligence of which has caused the accident. Thus in New York, the Revised Statutes,² after providing for an action for the benefit of the widow and next of kin killed by the wrongful act of any person or corporation, in cases in which the deceased, if he had survived, would have been entitled to an action, further provide that "every agent, engineer, conductor, or other person in the employ of such company, or persons through whose wrongful act, neglect, or default, the death of a person shall have been caused as aforesaid, shall be liable to be indicted therefor," and, upon conviction, may be punished by fine or imprisonment, or both. Where proceedings are had under a criminal indictment, the action is generally treated as a civil action in its principal features, and like rules of evidence are to be applied to the trial of it.³

(c) *Venue of the Statutory Action for Death.*

§ 26. **Generally.** — The weight of authority seems to support the doctrine that the statutes creating right of action for damages arising by reason of the death of a person, caused by the negligent act of the defendant, have no application in any foreign jurisdiction unless a similar right has been created in that jurisdiction. It is generally admitted that the common law did not impute the death of any person as a civil injury to another,⁴ and so it is considered that these statutes create a right unknown to the common law. Thus the court, commenting upon the English statute,⁵ distinguished the action

¹ See § 24.

² 5th ed. vol iii. p. 590.

³ *State v. Manchester & Lawrence R. R.*, 52 N. H. 528, and see *State v. Grand Trunk Railway*, 58 Maine, 176. The remedy by indictment, against a railroad, in Maine, is abrogated by St. 1891, c. 124. See *State v. Maine Central R. R.*, 90 Maine, 267; *Commonwealth v. Fitchburg R. R.*, 10 Allen, 189; *Commonwealth v. Worcester R. R.*, 101 Mass. 201.

⁴ See § 15, *ante*.

⁵ 9 & 10 Vict. c. 93; see § 22, *ante*.

created by the statute from that which, at the common law, might have accrued to the injured person in his own behalf, had he survived the accident, and said: "It will be evident that this act does not transfer this right of action to his representative, but gives to his representative a totally new right of action on different principles. The measure of damage is not the loss or sufferings of the deceased, but the injury resulting from his death to his family."¹ And so it is said that in an action founded upon tort it is contrary to principle and authority to hold that an English court will enforce a foreign municipal law and give damages in respect of an act which, according to its own principles, imposes no liability upon the defendant,² and that no action can be maintained in England for a tort committed within the jurisdiction of a foreign country, unless the act is wrongful both by the law of the country where it was committed and by the law of England.³

§ 27. *In the United States.*—In the United States, this question has been very fully discussed. In a leading case arising under the statute of New York, it appeared that the defendant, a corporation chartered under the laws of that State, operated a railroad in New Grenada, and had made a contract, in New York, with the plaintiff's intestate, to transport him as a passenger over its railroad. The plaintiff's intestate, being killed by the alleged negligence of the defendant in performing its duty to him as a common carrier, the plaintiff brought his action for damages in New York, under the statutes. The plaintiff's complaint did not allege that the law of New Grenada would authorize a similar action in the courts of that country. It was held that the plaintiff could not recover, for that the local statute under which the action was brought was not simply remedial, but created a new cause of action in favor of the personal representatives of the deceased, which was wholly distinct from, and not a revivor of,

¹ *Blake v. Midland Counties Railway*, 21 L. J. Q. B. 233, and see *Needham v. Grand Trunk Railway*, 38 Vt. 294; § 23, *ante*.

² *The Halley*, L. R. 2 P. C. 193 (distinguishing *Smith v. Condrey*, 1 How. U. S. 28).

³ *The M. Moxham*, 1 P. D. 107.

that cause of action which the deceased would have had, if he had survived, for his bodily injury. It was also held that the court could not assume that a like statute existed in New Grenada, where the accident occurred. Denio, J., said: "Whatever liability the defendants incurred by the laws of New Grenada, by the acts mentioned in the complaint, might well be enforced in the courts of this State; the defendant as a domestic corporation being readily compellable to answer here. But the rule of decision would still be the law of New Grenada, which the court and jury must be made acquainted with by the proof exhibited before them."¹ The presumption is that the common law prevails in the State where the accident happens, and no such presumption prevails as to the existence of the statute. The case is to be distinguished when the wrong complained of was a violation of a common-law right, existing both in the jurisdiction in which the injury occurred and in that where the action is sought to be maintained.²

§ 28. **As between different States.** — The same rule is applied whether the question arises upon the law of a State and a foreign country or upon the law of two of the States.³ Thus an action was brought in Massachusetts by an administrator appointed in that State upon the statute of New York providing for an action in behalf of the personal representative of a person killed by the wrongful act of another person, or corporation, in cases in which the deceased person, had he survived, might have had such action; the action to be for the benefit of the widow and next of kin of the deceased person, and the damages to be divided as under the statute of distributions. The court said: "By the common law, and by the laws of this Commonwealth, no action could be brought

¹ Whitford v. Panama R. R., 23 N. Y. 465. See also McDonald v. Mallory, 77 N. Y. 547; Vandenwater v. New York & N. H. R. R., 27 Barb. 244; Crowley v. Panama R. R., 30 Barb. 99; Beach v. Bay State Steamboat Co., 30 Barb. 433; Turner v. St. Clair Tunnel Co., 111 Mich. 578; Alexander v. Penn. Co., 48 Ohio St. 623; Anderson v. M. & St. P. R. R., 37 Wis. 321.

² State v. Pittsburg & Connellsville R. R., 45 Md. 41.

³ Leonard v. Columbia Steam Navigation Co., 84 N. Y. 48.

against the railroad company for negligently causing the death of the plaintiff's intestate. . . . The plaintiff rests her case wholly on the statute of New York. If this be a penal statute it cannot be enforced beyond the territory in and for which it was enacted. If it gives a new and peculiar system of remedy, by which rights of action are transferred from one person to another in a mode which the common law does not recognize, and which is not in conformity with the laws or practice of this Commonwealth, there is an equally insuperable objection to pursuing such a remedy in our courts." And the court held that the New York statute did introduce a principle unknown to the common law, and so sustained the defendant's demurrer.¹

§ 29. **When Foreign Actions maintained.**—On the other hand an action may be maintained in one State by the personal representative of a person whose death resulted from an injury received in another State, through the negligence of the defendant, where the statutes of the two States giving the personal representative the right are similar in purpose and substance, although they be not precisely the same,² or although the incidents of recovery in the one jurisdiction may differ from those in the other.³ In an action brought in Massachusetts for a personal injury received in Connecticut, it appeared that, under the Connecticut decisions, the action might be maintained, but that under the Massachusetts decisions the injury would have been regarded as caused by the negligence of a fellow-servant of the plaintiff, who, therefore, would be debarred from recovering. It was held that the action might be maintained in Massachusetts, the court saying: "we are of opinion that, as between the States of this Union, when a transitory action has vested in one of them under the common law

¹ *Richardson v. New York Central R. R.*, 98 Mass. 85. The case of *Woodward v. Michigan Southern & Northern Indiana R. R.*, 10 Ohio St. 121, was decided on similar grounds, but the pleadings did not allege that an action would lie in Illinois, the action being in Ohio, and the question was not fully considered.

² *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48.

³ *Higgins v. Central N. E. & W. R. R.*, 155 Mass. 176. See *Chandler v. N. Y., N. H., & H. R. R.*, 159 Mass. 589.

as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties.”¹ But it is apprehended, where the statute of a State is in the nature of a penal statute, that is, where the damages recovered are to be assessed according to the culpability of the defendant, that an action on the statute cannot be supported in another State where the measure of damages is the pecuniary loss suffered by the persons for whose benefit the action is brought.² In Kansas, it was held that the statute³ providing for an action in the case of death had no extra-territorial force.⁴ The statute of New Jersey⁵ gives a right of action, for death, to the personal representative of the deceased, while under the statute of Pennsylvania,⁶ such right is given to his widow. An action being brought by the widow, in Pennsylvania, for a death caused by the defendant's negligence in New Jersey, it was held that the action could not be maintained.⁷

¹ *Walsh v. N. Y. & N. E. R. R.*, 160 Mass. 571.

² See remarks of Hoar, J., in *Richardson v. New York Central R. R.*, 98 Mass. 85, and of Miller, J., in *Dennick v. Central R. R. of New Jersey*, 103 U. S. 11, and *Illinois Central R. R. v. Crudup*, 63 Miss. 291.

³ Civil Code, § 422, Gen. Sts. 1868, pp. 708, 709.

⁴ *McCarthy v. Chicago, Rock Island & Pacific R. R.*, 18 Kan. 46, and see *Nashville & Chattanooga R. R. v. Eakin*, 6 Cold. 582; *Hover v. Pennsylvania Co.*, 25 Ohio St. 667; *Selma, Rome & Dalton R. R. v. Lacy*, 43 Ga. 461. In *Needham v. Grand Trunk Railway*, 38 Vt. 295, it was held that the action could not be maintained for the reason that the injury complained of occurred in New Hampshire where there was no statute giving a right of action. In *State v. Pittsburg & Connellsville R. R.*, 45 Md. 41, there was no allegation by the plaintiff of the existence of such a statute in the State where the injury occurred, and the action failed on that ground.

⁵ P. L., 151.

⁶ P. L., 309.

⁷ *Usher v. West Jersey R. R.*, 126 Penn. St. 206; *Derr v. Lehigh Valley R. R.*, 158 Penn. St. 365. But see § 30, *post*. In Wisconsin, under sec. 4255 S. & B. Ann. Sts., giving a right of action for death, &c., “provided that such action shall be brought for a death caused in this State and in some court . . . of the same,” it is held that an action might be maintained for a death occurring in another State but resulting from negligent acts of the defendant in Wisconsin. *Rudiger v. Chic., St. P., &c. R. R.*, 94 Wis. 191.

§ 30. **Rule of the Federal Courts.** — The Federal Courts are disposed to hold a very broad jurisdiction in respect of actions brought in one State for a cause of injury occurring in another. In the Supreme Court of the United States, it has been held that when the statute of a State gives a remedy for the death of a person caused by the negligence of another, and provides that the action shall be brought by the personal representative of the deceased person, such personal representative appointed in a State other than that in which the death occurred may bring such action in the courts of the State in which he was appointed; and such courts can compel distribution of the amount recovered in the manner prescribed by such statute. Miller, J., said: "The action is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. . . . We do not see how the fact that it was a statutory right can vary the principle. . . . If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred." This case arose under the statute of New Jersey, which provides no limit of the amount to be recovered, and that the "jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person;" and Miller, J., said, "It is scarcely contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury,"¹ and later, in an action by the representatives of a railway employee against the company to recover damages for the death of the employee through the negligence of the company, which was tried in a different State from that in which the contract of employment was made and the

¹ *Dennick v. Central R. R. of New Jersey*, 103 U. S. 11.

accident took place, it was held, definitely, that the right to recover, and the limit of the amount of damages are governed by the *lex loci* and not by the *lex fori*. It is said: "The statute of another State has, of course, no extra-territorial force, but the rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. . . . The law of the place where . . . the liability was incurred will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought. . . . The courts of no country execute the penal laws of another. But . . . the rule cannot be invoked as applied to a statute . . . which merely authorizes a civil action to recover damages for a civil injury."¹ In a later case, where it appeared that, under a statute of Maryland authorizing the survival of the right of action, the State is made the plaintiff, and the jury is to apportion the damages, and that, under the act of Congress, in the District of Columbia the personal representative of the deceased person is made the plaintiff and the law apportions the damages, it was held by the Supreme Court that these differences were not sufficient to render the respective statutes inconsistent; and, accordingly, that an action brought in the District of Columbia by the personal representative of one killed, by reason of the defendant's negligence, in Maryland, might be maintained. The court says that the purpose of the several statutes passed in the

¹ Northern Pac. R. R. v. Babcock, 154 U. S. 190. In this case the accident occurred in Montana, where the amount of damages to be recovered by the representative of the deceased was unlimited, and the action was brought in Minnesota, where damages in such cases were limited, and it was held that the Minnesota rule of damages applied. See *Herrick v. Minn. & St. L. R. R.*, 31 Minn. 11; *Texas & Pacific R. R. v. Cox*, 145 U. S. 593. Sect. 2452, Vermont Sts. 1894, provides that, as against a corporation, an action for damages for the death of a person "shall be brought in the name of the personal representative of the deceased." The Civil Code of Lower Canada provides that "the consort" of the deceased "and his ascendant and descendant relations have a right . . . to recover." It was held that these statutes were not dissimilar, and that an action for death by defendant's negligence might be maintained in Vermont, although the negligent act was done in Canada. *Boston & Maine R. R. v. McDuffey*, 51 U. S. App. 111.

States in more or less conformity with Lord Campbell's Act is to provide means for recovering damages caused by what is in its nature a tort, and where such a statute simply removes a common-law obstacle to a recovery for a tort, an action for that tort can be maintained in any State, in which that common-law obstacle has been removed, when the statute of the State in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the State in which the action is brought.¹

¹ *Stewart v. Balt. & Ohio R. R.*, 168 U. S. 445. It appears never to have been affirmed directly by the Supreme Court of the United States, in a case presenting the question, that an action by libel, *in personam*, for damages for death under statutes like Lord Campbell's Act, in force where the cause of action arises, can be entertained and carried to a decree in a Federal court of Admiralty; but it appears to be clear that if the local law gives a right of action, *in personam*, for a cause of action of a maritime nature, a Federal court of Admiralty may administer the law by proceedings *in personam*. See *The City of Norwalk*, 55 Fed. Rep. 98; *The Transfer*, No. 4, 20 U. S. App. 570; *The City of Mackinac*, 43 U. S. App. 190; *The Williamette*, 44 U. S. App. 26.

CHAPTER II.

OF PARTIES DEFENDANT.

SECTION I.

OF THE JOINT AND SEVERAL LIABILITY.

§ 31. **Defendants Jointly and Severally Liable.** — Where the immediate act of which the plaintiff complains is done by the co-operation, or the joint act, of several persons, they are all trespassers and may be sued jointly, or as each of them is liable for the injury done by all, either may be sued alone.¹ But to render one liable in trespass for the acts of the others it must appear either that they all acted in concert, or that the act of the one sought to be charged might be expected ordinarily and naturally to procure or induce the acts of the others.² It is said that in any action brought for a personal injury the question whether several persons may be joined as parties defendant depends upon whether or not such persons were engaged in a common act of such a character as to endanger the plaintiff and cause the injury of which he complains. If such is the fact, then the several persons so engaged are liable as joint trespassers for their common act,

¹ *Washington & Georgetown R. R. v. Hickey*, 166 U. S. 521. A covenant not to sue one of two tort-feasors is not an accord and satisfaction with both. But a release of the cause of action made to one of several joint feors is a release to all. *Chicago v. Babcock*, 143 Ill. 358; *Snyder v. Witt*, 99 Tenn. 618.

² See *Guille v. Swan*, 19 Johns. 381, 382. Where mail-carriers unnecessarily obstruct the platform of a railway station, thereby causing injury to one who recovers therefor from the railway company, the latter is not a joint wrong-doer in such a sense as to prevent a recovery from the mail-carriers of the amount paid on the judgment. *Old Colony R. R. v. Slavens*, 148 Mass. 363.

and are subject to joint action of trespass or tort in the nature of trespass, and, in such action, one may be charged and another discharged.¹ Thus where several persons were engaged in a game of cricket within the limits of a public highway they were held to be jointly liable to the plaintiff for a personal injury thereby caused him.² It may be said, generally, that if at common law each of several persons would be liable in trespass for the same act, they are jointly liable. Thus a corporation and its servant were held jointly liable for an injury unnecessarily inflicted by the servant upon the plaintiff in carrying out the directions of the corporation.³ On the other hand, if the plaintiff's remedy as against one party would be by an action of trespass, and against another by an action of trespass on the case, then such parties are not to be joined in the same action. Thus where the principal is made responsible for the act of his agent because of the agency and not because the two are joint actors, the remedy as against the agent would be in trespass, and against the principal by an action of trespass on the case, and the two could not be made joint defendants.⁴ In accordance with the rule stated, where a collision of railway trains, or of a steam car and a street car, is brought about by the concurring negligence of the two companies, they are jointly or severally liable.⁵ And a gas company is liable for an injury arising from a gas explosion caused by the combined negligence of a construction company in connecting gas mains and of the gas company in prematurely forcing the gas into them.⁶

§ 32. **So, although Contract Relation exists.**—It has been seen that although a contract subsists between the injured

¹ *Matthews v. Del. L. & W. R. R.*, 56 N. J. L. 34; *West Chicago St. R. R. v. Piper*, 165 Ill. 325; *Richmond & D. R. R. v. Greenwood*, 99 Ala. 501.

² *Vosburg v. Moak*, 1 Cush. 453, and see *Phillips v. Hall*, 10 Wend. 654.

³ See § 44, *post*, and *Hewett v. Swift*, 3 Allen, 420.

⁴ *Mulchey v. Methodist Religious Society*, 125 Mass. 487.

⁵ *McDonald v. Louisville & N. R. R.*, 47 La. Ann. 1440; *O'Toole v. Pittsburgh & L. E. R. R.*, 158 Penn. St. 99.

⁶ *Chicago, &c. Gas Co. v. Meyers*, 168 Ill. 139.

person and the wrong-doer, and although the act complained of is a violation of the contract,¹ yet the plaintiff may waive the remedy upon the contract obligation and sue in tort for the breach of the general duty. It follows, if there be several joint contractors in equal wrong, upon the general principle stated, that the plaintiff suing in tort may join all the contractors as defendants or may pursue his action against any number less than all. Thus in an action of tort brought against several proprietors of a stage coach, founded upon an injury alleged to have been caused by the negligence of the defendants, the jury having found in favor of some of the defendants and against the others, it was held that a judgment upon the verdict was to be supported, since from the nature of the case and the form of the action the liability was several and not joint.²

¹ As to the rights of the passenger, no contract between the carrier and the passenger need appear. When a person takes passage with a common carrier, the law implies a contract of a safe passage for a fair compensation. *Frink v. Schroyer*, 18 Ill. 416; *Pittsburgh C. C. & St. L. R. R. v. Russ*, 18 U. S. App. 279; *Crane Elevator Co. v. Lippert*, 24 U. S. App. 176. See § 4, *ante*, and cases cited.

² *Bretherton v. Wood*, 6 Moore, 141, 3 Brod. & B. 54, as cited *ante*, § 5, *n.* In *Alton v. Midland Railway*, 19 C. B. (N. S.) 213, 233, the principle is said to be this: that when the action is maintainable for the tort simply, without reference to any contract between the parties, no advantage can be taken of the omission of some defendants or of the joinder of too many. But where the action is not maintainable without referring to a contract between the parties, and laying a ground for it by showing such a contract, then all the defendant contractors must be joined. But this case, as has been stated, proceeds upon the doctrine that, whenever a contract exists between the parties plaintiff and defendant, of which contract the defendant's act complained of is a breach, then the wrongful act is to be referred solely to the breach of contract, so that even if the plaintiff sue in tort all the incidents of an action of contract attach to his action, — a doctrine which is believed to be unsupported by authority. See the case fully discussed, § 11 and note, *ante*.

SECTION II.

LIABILITY OF MASTER FOR ACTS OF SERVANT OR AGENT.

(a) *Generally.*

§ 33. **Respondeat Superior: General Rule.** — It is a rule of the common law that the master is responsible for the acts of the servant whom he selects, and through whom, in legal contemplation, he acts, provided that the particular act was done by the servant in the carrying out of the authority given to him by his master, and for the purpose of doing what he has been set to do.¹ And this is so whether the wrong done was the result of the mere negligence of the servant in doing what he had to do, or by his wanton and reckless purpose to accomplish the business in an unlawful manner. Thus if the master orders his servant to do an act the doing of which implies the use of force and violence to others, leaving the servant to determine the extent and kind of force to be used, he will be liable if the servant, in executing the order, uses force in any unjustifiable manner or degree.² So, if a servant, in performance of the work which has been intrusted to him, wrongfully assaults a third person, both master and servant are liable for the resulting injury and may be joined in the same action.³ And this is so even if the act of the servant be in itself justifiable, as where the servant of a railway company uses unnecessary violence in removing a disorderly passenger from the car of the corporation.⁴ In such a case both master and servant are answerable in trespass, and may be joined as defendants.⁵ When the testimony in any case is conflicting,

¹ *Hilliard v. Richardson*, 3 Gray, 349; *Wyllie v. Palmer*, 137 N. Y. 248; *Rait v. N. E. Furniture Co.*, 66 Minn. 76.

² *Howe v. Newmarch*, 12 Allen, 49; *Schaefer v. Osterbrink*, 67 Wis. 495.

³ *Canfield v. Chic. R. I. & Pac. R. R.*, 59 Mo. App. 354.

⁴ *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Sandford v. Eighth Ave. R. R.*, 23 N. Y. 343.

⁵ See § 31, *ante*. And the rule applies whether the master be a private person or a corporation. See § 44, *post*. The rules on this subject are

or the conclusion to which it leads doubtful, the question whether the relation of master and servant existed is one of fact.¹ Where the injury complained of is the result of the violation by the servant of a statutory duty not existing at common law, the penalty for such violation being imposed solely upon the party guilty of it, the master will not be responsible for such a violation. Thus where the servant neglected to drive his master's vehicle to the right of the road upon meeting another vehicle, in violation of a statute prescribing the law of the road, it was held that the master could not be charged in an action upon the statute.² But the master may be liable in a common-law action for the injury.³ If a servant, in going out of his way, is still engaged in his master's business, within the scope of his employment, the fact that he joins with this some private business or purpose of his own is immaterial. Where the question of the master's responsibility turns on the extent of the deviation by the servant from the strict line of his duty, it is generally a question of fact. Where the deviation is slight, and not unusual, the court may, as matter of law, determine that the servant was still engaged in his master's business; or, when the deviation

the same by the civil law. See *Camp v. Wardens of Church of St. Louis*, 7 La. Ann. 321. By the Civil Code of Louisiana, art. 2299, it is provided that masters and employers shall be answerable for the damages occasioned by their servants and overseers in the exercise of the functions in which they are employed. For the rule of the Civil Law upon the subject, see Domat, *Lois Civiles*, liv. 2, tit. 8; Dalloz, tit. *Responsabilité*; Pothier, *Obligations*, No. 116; Devlincourt, tome 2, p. 492.

¹ *Northwestern Union Packet Co. v. McCue*, 84 U. S. 108; *Forsyth v. Hooper*, 11 Allen, 419; *Kimball v. Cushman*, 103 Mass. 194; *Preston v. Knight*, 120 Mass. 5. One who is the general servant of another may be lent or hired by his master to another for a special service, so as to become, as to such service, the servant of the third party. The test in such cases is whether, in the service which he is engaged to perform, he continues liable to the direction and control of the master, or subject to that of the party to whom he is lent or hired. *Coughlan v. Cambridge*, 166 Mass. 268, and see *Ward v. New England Fibre Co.*, 154 Mass. 419; *Hasty v. Sears*, 157 Mass. 123; *Samuellian v. American Tool & Machine Co.*, 168 Mass. 12; *Dean v. E. Tenn., &c. R. R.*, 98 Ala. 586.

² *Goodhue v. Dix*, 2 Gray, 181.

³ *Reynolds v. Hanrahan*, 100 Mass. 313.

is very marked and unusual, that he was engaged, not in his master's business, but in his own.¹

§ 34. **Illustrations of the General Rule.** — The master is liable for an assault committed by the servant in taking possession of personal property by the master's directions,² and a druggist is liable for the consequence of his clerk's negligence in selling poison in the course of his employment.³ Where a railway engineer, in violation of the rule of his road, invited a child to ride in the cab of his locomotive, and, while the locomotive was in motion, forced him to jump off, whereby the child was injured, it was held that the engineer was acting within the scope of his employment in compelling the boy to leave the locomotive; and so that the railroad company was liable for the injury.⁴ So where a boy was stealing a ride on a freight train, and a brakeman threw pieces of coal at him to drive him from the train, one of which struck him on the head, knocking him under the wheels of a car and injuring him, it was held that the defendant company was responsible for the injury.⁵ Where a railway yard-master operated a train for his own ends, whereby another employee of the railroad was injured, it was held that the company was not liable for the injurious result of the yard-master's acts.⁶ A railway engine crew moving cars on the track of a private shipper, with his knowledge and under his direction, are, *pro hac vice*, the servants of the shipper, and for their negligence the shipper only will be liable.⁷ The defendant and two other railroad companies had two other crossings near the one where the accident occurred, and each crossing was used by each road in common. Each company employed and paid one of the flagmen, and the flagman at the crossing where the accident

¹ *Ritchie v. Waller*, 63 Conn. 155.

² *McClung v. Dearborn*, 26 W. N. C. 43.

³ *Osborne v. McMasters*, 40 Minn. 103.

⁴ *Chicago, Milwaukee & St. P. R. R. v. West*, 28 Ill. App. 44, 125 Ill. 320. See *Bowler v. O'Connell*, 162 Mass. 319; *Driscoll v. Scanlon*, 165 Mass. 348.

⁵ *Lang v. New York, L. E. & Western R. R.*, 51 Hun, 603.

⁶ *Chicago, St. P., &c. R. R. v. Davidson*, 27 U. S. App. 681.

⁷ *McInerney v. Del. & H. Canal Co.*, 151 N. Y. 411.

occurred was employed and paid by the defendant road. It was held that the defendant road was liable for his negligence although at the time of the accident he was flagging a train belonging to another company.¹ The owners of a vessel are liable for the torts of the master done in the execution of the business in which the vessel is engaged.² In an action for personal injuries against a steamship company which had undertaken to load a lighter alongside its wharf with cotton, there was evidence that its employees, in wheeling the bales on board the lighter, were to act under the direction of its stevedore; but, in throwing the bales through the hatch into the hold, under the direction of an officer of the lighter, it appeared that one of the employees wheeled a bale upon the lighter, and without receiving or waiting for orders from the officer of the lighter, threw the bale into the hold, thereby injuring the plaintiff. It was held that there was evidence that the employee, in throwing the bale, acted as the servant of the defendant.³ The general rule of liability has often been

¹ *Buchanan v. Chic. M. & St. P. R. R.*, 75 Iowa, 393. Where, at the crossing of three railroads by a single street, one set of gates is managed for the benefit of all the railroads, by a gateman employed and controlled by one of them, with the assent of the others who are responsible to the employing railroad for a part of his wages, such gateman is the servant of the employing railroad, which may be responsible to a traveller injured by a train upon one of the other roads through the gateman's negligence in managing the gates. *Brow v. Boston & Albany R. R.*, 157 Mass. 399.

² *The State of Missouri*, 46 U. S. App. 245.

³ *Hickey v. Merchants' & Miners' Transp. Co.*, 153 Mass. 39. See *Blaikie & Stembridge*, 6 C. B. (N. S.) 894; *Warburton v. Great Western Railway*, L. R. 2 Ex. 30. A passenger purchased from a railroad company a ticket over its line, and at the same time from the Pullman Palace Car Company a ticket entitling him to a berth in one of its sleeping cars, constituting a part of the train of the railroad company. In the course of transportation he was injured by the falling of a berth in the sleeping-car in which he was at the time riding. It was held that the sleeping-car company, its conductor, and porter, were in law the servants and employees of the railroad company, and that their negligence was that of the company. *Pennsylvania Co. v. Roy*, 102 U. S. 451. A lessee or licensee of the exclusive privilege of entering cars or upon the right of way of a railroad corporation to sell lunches, is not a servant of the corporation in such sense as to make the latter liable for an assault committed by the licensee upon a competitor for the business. *Fluker v. Georgia R. R. &*

applied in actions brought against common carriers of passengers for injuries caused by the acts of their servants, either in ejecting passengers, without right, from cars or other vehicles; or, when such ejection was legally justifiable, in employing unnecessary force and violence in accomplishing it.¹ And if the carrier wrongfully ejects the passenger he is liable for the injuries thereby caused to the latter, although the resistance of the passenger to the wrongful removal contribute to cause such injuries.²

Banking Co., 81 Ga. 461. Where the defendant's servant, driving his wagon, took E., an acquaintance, upon the wagon, at E.'s request, and E., while adjusting empty barrels upon the wagon, threw one of them against and injured the plaintiff, it was held that while E. was not a servant of the defendant, yet the defendant was liable for the injury done to the plaintiff if the negligent act was done by the direction or with the assent of the driver. *James v. Muehlebach*, 34 Mo. App. 512. But where the defendant's servant, without the knowledge or authority of his master, hired a third person to do his work temporarily, and, by the negligence of such third person, the plaintiff was injured, it was held that there was no cause of action for such injury as against the master. *Mangan v. Foley*, 33 Mo. App. 250.

¹ *Moore v. Fitchburg R. R.*, 4 Gray, 465; *Holmes v. Wakefield*, 12 Allen, 580; *Wright v. New York Central R. R.*, 25 N. Y. 562; *Warner v. Erie R. R.*, 39 N. Y. 468; *English v. Canal Co.*, 66 N. Y. 454; *Frazier v. Pennsylvania R. R.*, 38 Penn. St. 104; *Pennsylvania R. R. v. Vandiver*, 42 Penn. St. 365; *Gallagher v. Piper*, 16 C. B. (N. S.) 361; *Feltham v. England*, 2 Q. B. 33; *Bayley v. Manchester, S. & L. R. R.*, 7 C. P. 415; and cases cited, *post*, § 73. The conductor of a freight train prohibited from carrying passengers acts within the scope of his authority in compelling a would-be passenger to leave the train, and the railroad is liable for injuries to the latter caused by his ejection from a rapidly moving train. *Stone v. Chic., St. P., & C. R. R.*, 88 Wis. 98, and see *Boehm v. Duluth So. Shore, & C. R. R.*, 91 Wis. 592. The rule applies to a sleeping-car company, acting as a common carrier. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222. The rule was applied where unnecessary force was used in ejecting an intruder from the building of a corporation. *Hewett v. Swift*, 3 Allen, 420. In *Barrett v. Malden & Melrose R. R.*, 3 Allen, 101, it was held that the defendant might be liable for damages sustained in consequence of the bite of a dog kept about its buildings and allowed to ride in its cars by its servants.

² See cases cited, *supra*, and also *Louisville, N. A. & C. Railway Co. v. Wolfe*, 128 Ind. 347; *Lake Erie & Western Railway v. Acres*, 108 Ind. 548; *Chicago, St. L., & P. R. R. v. Holdredge*, 118 Ind. 281; *Southern Kansas Railway v. Rice*, 38 Kan. 398.

§ 35. **Authority of Servant to do the Act inferred from the Employment.** — It seems that, ordinarily, the fact of the employment will justify the conclusion that the act complained of was done by the authority of the master.¹ Thus where the plaintiff, being a passenger for hire in the defendant's omnibus, was expelled by the conductor of the omnibus, for what the conductor deemed improper conduct, and with such violence that the plaintiff was injured, it was considered that the defendant must be taken to have given authority to the conductor to expel any person he believed was behaving improperly, and so that the conductor in removing the plaintiff was acting within the scope of his authority, and the defendant might be liable.² So a street railway company was held liable for the injuries caused by the act of the driver of one of its cars in wrongfully ejecting a passenger from the platform of the car, although the act of the driver was not merely negligent but malicious and wilful, and it was said that it must be deemed a part of the employment of a driver to put a person off the platform of the cars who is there without right, and by employing the driver the company leave it to him to determine the propriety of ejecting a passenger and the degree of force to be used in doing it.³

§ 36. **Master may be liable, although Servant act without, or against, Orders.** — It is the duty of the master to employ suitable and prudent servants to execute his orders, and he will be liable for the wrongful or negligent acts of his servants, done within the general scope of their authority, although not

¹ See *Guinney v. Hand*, 153 Penn. St. 404.

² *Greenwood v. Seymour*, 4 L. T. R. (N. S.) Exch. 835.

³ *Meyer v. Second Avenue R. R.*, 8 Bosw. 305. Contrary expressions contained in *Hibbard v. New York & Erie R. R.*, 15 N. Y. 457, are *obiter dicta*. Under the code of Georgia, § 3033, providing that railroad companies shall be liable for damages caused by their employees unless their agents have exercised reasonable care and diligence, such company is liable for the killing of a person lawfully in its station and transacting business with its agent, as such, although such agent was so far insane as not to be responsible criminally for his own act, if the company employed him knowing of his insanity. *Christian v. Columbus & R. R. R.*, 79 Ga. 460.

done by his express orders¹ or the orders of a superior servant,² or even if done against orders.³ Thus, where the servant, driving his master's carriage to a certain place to execute a commission of his master, against the master's express direction, deviated from the road to do an errand of his own, and in returning injured the plaintiff by driving against her, it was held that the master was liable. Erskine, J., said: "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not intrusted the servant with the control of the carriage; but whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law; the master in such a case will be liable, and the ground is that he has put it in the servant's power to mismanage the carriage, by intrusting it to him."⁴ So a railroad corporation is liable for injuries sustained by a person who while entering its station for the purpose of taking a train is struck and knocked down through the act of its servant, done in the scope of his employment, in ejecting a drunken man from the premises.⁵ So where the engineer of a locomotive had been forbidden, in the execution

¹ *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Powell v. Deveney*, 3 Cush. 300; *Southwick v. Estes*, 7 Cush. 385; *Barden v. Felch*, 109 Mass. 154; *Hamel v. Brooklyn & N. Y. Ferry Co.*, 6 N. Y. Supp. N. E. Rep. 102 (1889); *North Chicago Railway v. Gastka*, 21 N. E. Rep. 522 (Ill. 1889); *Clark v. Koehler*, 46 Hun, 536; *Schmidt v. Steinway & H. P. R. R.*, 55 Hun, 496; *McClung v. Dearborn*, 26 W. N. C. 43.

² *Coleman v. New York & N. H. R. R.*, 106 Mass. 160. In this case the defendant was held to be liable for unjustifiable violence used by its servants in expelling the plaintiff from a railway train, such servants being the assistants of the conductor, and the violence used being against the conductor's orders.

³ *McCann v. Cons. Traction Co.*, 59 N. J. L. 481.

⁴ *Sleathe v. Wilson*, 9 C. & P. 607.

⁵ *Gray v. Boston & Maine R. R.*, 168 Mass. 20.

of his employment, to run his locomotive upon a certain track, but disobeyed orders, whereby a passenger of the defendant was injured, it was held that the defendant was liable for the injury.¹ A railway engineer who without orders and in violation of the rules of the company attempts to run his engine from one station to another, and in so doing comes into collision with another train belonging to the company is still in the line of his employment, and the company is liable for the resulting injury to a passenger on the train.²

§ 37. **When Master not responsible.** — “When a servant quits sight of the object for which he was employed, and, without having in view his master’s orders, pursues that which his own malice suggests, his master will not be liable for such acts.”³ Thus, if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produces the accident, the master will not be liable. But if, in order to perform his master’s orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pur-

¹ *Philadelphia & Reading R. R. v. Derby*, 14 How. 468. Where the wanton and malicious use of a locomotive whistle by the engineer in charge frightened the plaintiff’s horse, which ran and injured the plaintiff, it was held, by a majority of the court, that the railroad was liable, *Texas & Pac. R. R. v. Scoville*, 23 U. S. App. 506, the court saying: “To say that the engineer and fireman who have charge of the locomotive on a regular run may while so running it blow the whistle wantonly and maliciously . . . to separate themselves, in and by that act, and for that instant, from the company’s service, is to refine beyond the line of safety and sound reason.”

² *Fitzsimmons v. Mil. L. S. & W. R. R.*, 98 Mich. 257.

³ Per Lord Kenyon in *McManus v. Crickett*, 1 East, 106. Where a conductor, believing that a certain person had broken open a car of the railway company, without a word, walked up to such person, standing quietly on the platform of a station, and shot him down; it was held that the act constituted murder, and was in no sense within the scope of the conductor’s employment. *Candiff v. Louisville, N. O. & T. R. R.*, 42 La. Ann. 477 (compare *Railway Co. v. Hackett*, 58 Ark. 351). See *Winkler v. Fisher*, 95 Wis. 355; *Goodloe v. Memphis & C. R. R.*, 106 Ala. 233; *Golden v. Newbrand*, 2 N. W. Rep. (Iowa) 537; *Davis v. Hough-tellin*, 33 Neb. 582; *Vernon v. Cornwell*, 104 Mich. 62.

suance of the servant's employment.¹ And the general rule seems to be that when the master is liable for the acts of his servant, this is because such acts are taken to be done by the direct or implied authority of the master, or in the exercise of a discretion vested in the servant in respect of the thing to be done. And when it appears that master was not negligent in the selection of the servant and that no authority or discretion was vested in the servant to do the act complained of, then the master is not to be held liable therefor,² as where the servant did the wrong complained of not as a concomitant of the execution of his orders but for some private end or advantage of his own, or of a third person.³ But if there is

¹ *Craft v. Abison*, 4 B. & Ald. 590, and see *Greenwood v. Seymour*, 4 L. T. Rep. (N. S.) Exch. 835; *Fowler v. Holmes*, 24 N. Y. S. Rep. 299; *Mitchell v. Crasweller*, 13 C. B. 237; *Storey v. Ashton*, L. R. 4 Q. B. D. 476; *Bolingbroke v. Swindon*, L. R. 9 C. P. 575; *Lyons v. Martin*, 8 A. & E. 512; *Stevens v. Woodward*, 6 Q. B. D. 318; *Rayner v. Mitchell*, 2 C. P. D. 357.

² *Howe v. Newmarch*, 12 Allen, 49; *McGilvray v. West End St. Railway*, 164 Mass. 122.

³ *Levi v. Brooks*, 121 Mass. 501; *Brown v. Jarvis Engineering Co.*, 166 Mass. 75. A railroad corporation is not liable for the consequences, if a fireman, without the authority of the conductor, take torpedoes from the caboose and place them on the track, in order to assist in a Fourth of July celebration. *Chicago, Burlington & Quincy R. R. v. Epperson*, 26 Ill. App. 72. It was held that one whose duty it was to superintend the delivery of goods sold by his employer, did not act within the scope of his employment in assaulting another who refused to accept certain goods, although the purpose of the assault was to compel the acceptance of the goods. *Meehan v. Morewood*, 52 Hun, 566. Although the general rule is settled that, in order to make the master responsible for an assault committed by his servant, the servant's act must have been done in the carrying out of his employment, it is possible that an exception to the rule arises when the master owes to the injured person a peculiar duty which involves in its performance the employment of proper and discreet servants. Thus a customer in a shop may have a right to look for courteous behavior from the servants of the proprietor; and so it has been held that the proprietor was liable for the maltreatment of one of his customers by an employee, although the employee, in making the assault, did not act within the scope of his employment. *Mallach v. Ridley*, 24 Abb. N. C. 172. Where a railway porter assaulted a passenger, it was held to be a question for the jury whether he did this in the scope of his employment. *Dwinelle v. New York Cent. & H. R. R.*, 120 N. Y. 117, reversing 45

wantonness or mischief causing additional damage, in the act of a servant done within the scope of his employment, the damages for the resulting injury may be thereby enhanced as against the master.¹

§ 38. **Special Liability of Carriers of Passengers.** — While it is a general rule that the master shall be liable only for wrongful acts of his servant done in carrying out his employment, it would appear that the rule is to be more broadly applied in favor of the plaintiff in cases in which the action is by a passenger against a carrier for injuries resulting to the plaintiff from the tort of the servant of the carrier. Is it not necessary to consider whether the duty of the carrier is a public duty,² or one arising solely out of the contract of transportation, since, in either case, the obligation of the carrier is the same; but, considering that the relation of the parties arises out of the contract, it was held in a case in which a carrier by water was defendant, that “Passengers do not contract merely for shiproom and transportation from one place to another; but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons either by the carrier or his agents employed in the management of the ship or other conveyance.”³ Thus if the servant of the carrier wantonly assault, insult, or maltreat the passenger, although the wrongful act be not done within the line of the employee’s duty, but in the gratification of his own malicious disposition and for a purpose wholly unconnected with his employment, the carrier may be liable. Thus *Hun*, 139. See *Whatman v. Pearson*, 3 C. P. 422; *Northern Central R. R. v. State*, 29 Md. 420.

¹ *Hawes v. Knowles*, 114 Mass. 518. Where a toll-keeper in charge of a bridge, leased a portion of the bridge for the display and sale of certain articles, at the sight of which the plaintiff’s horse was frightened, and the plaintiff injured, it was held that the act of the toll-keeper in displaying such articles was not within the scope of his employment. *Wiltse v. State Board Bridge Co.*, 63 Mich. 639.

² See *Philadelphia & Reading R. R. v. Derby*, 14 How. 468.

³ *Pendleton v. Kinsley*, 3 Cliff. 416; *Dwinelle v. New York Central & H. R. R. R.*, 120 N. Y. 117. In the latter case, it was held that the carrier undertakes to protect its passengers against the wilful misconduct of its servants, and, *semble*, of its other passengers.

the defendant was a carrier of passengers upon a steamboat on which the plaintiff was a passenger for hire. The steward and waiters of the defendant accused the travelling companion of the plaintiff of evading payment for his supper, and, upon the plaintiff's remonstrating with them in a reasonable manner, turned upon and assaulted the plaintiff. It was held that the defendant was responsible.¹ The same rule of liability has been applied in cases of assaults by railway employees upon passengers on their trains.² It may be difficult to draw the line between those cases in which a wrongful act, clearly the result of the servant's malice, is to be imputed to the carrier, and those in which the remedy of the injured person is solely against the servant, but it is apprehended that these rules may be laid down as being supported by the weight of modern authority: (1) If the wrongful act is inflicted on the plaintiff while he is a passenger in actual course of transportation, by a servant of the carrier acting as such at the time of the act, the law will consider the carrier as responsible therefor, without inquiring whether the wrong was committed in the execution of the servant's employment: (2) But if the act were done by the servant not on duty, nor acting as the servant of the carrier at the time, then the servant alone is responsible.³ Thus in the case stated the court said: "If

¹ *Bryant v. Rich*, 106 Mass. 180, and see *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.*, 97 Mass. 361, 368. The liability arises out of the duty of the carrier to see that the passenger is not exposed to harm. Thus where a mob of drunken men forced a passage into the defendant's car and there fought with one another, and in so doing injured a passenger, it was held that the defendant was responsible, it not appearing that the conductor had done all in his power to stop the fighting. *Pittsburg, Fort Wayne & Chicago R. R. v. Hinds*, 53 Penn. St. 512. See also *Chicago & Alton R. R. v. Pillsbury*, 123 Ill. 9; *Putnam v. Broadway & 7th Ave. R. R.*, 55 N. Y. 108; *Flint v. Norwich & N. Y. Trans. Co.*, 34 Conn. 554; *N. O., St. L. & Chic. R. R. v. Burke*, 53 Miss. 200; *Pittsburg & Connellsville R. R. v. Pillow*, 76 Penn. St. 510; *Kinney v. Louisville & N. R. R.*, 99 Ky. 59.

² See *Bryan v. Chicago, R. I. & Pac. R. R.*, 63 Iowa, 464; *Gallena v. Hot Springs R. R.*, 13 Fed. Rep. 116; *Peeples v. Brunswick & A. R. R.*, 60 Ga. 281; *Chicago & E. R. R. v. Flexman*, 103 Ill. 546; *Dillingham v. Anthony*, 73 Tex. 47.

³ See *Chamberlain v. Chandler*, 3 Mason, 242; *Nieto v. Clark*, 1 Cliff.

. . . any of the officers or men connected with the running of the defendant's boat had met the plaintiff in the street or elsewhere, in a position wholly disconnected with their duties to the defendants, and committed an assault and battery upon him, it is clear that the defendants would not have been liable."¹

(b) *Servant and Contractor.*

§ 39. **Employer not liable for Acts of mere Contractor: Sub-Contractor.** — The rule of *respondeat superior* does not apply

145; *Goddard v. Grand Trunk Railway*, 57 Maine, 202; *Milwaukee & Mississippi R. R. v. Kinney*, 10 Wis. 388; *Baltimore & Ohio R. R. v. Blocher*, 27 Md. 277; *Stewart v. Brooklyn & Crosstown R. R.*, 90 N. Y. 588; *Dwinelle v. New York Central & H. R. R. R.*, 120 N. Y. 117; *McKinley v. Chicago & Northwestern R. R.*, 44 Iowa, 314; *Sherley v. Billings*, 8 Bush, 147; *Western & Atlantic R. R. v. Turner*, 72 Ga. 292; *Atlanta & West Point R. R. v. Condor*, 75 Ga. 51; *Central R. R. v. Peacock*, 69 Md. 257; *Lampkin v. Louisville & N. R. R.*, 106 Ala. 287.

¹ *Bryant v. Rich*, 106 Mass. 180, 188. It is said to be the policy of the law to give to the servants and agents of corporations a large and liberal discretion, and to hold the corporation responsible for all their acts, within the most extensive range of their charter powers. See *Philadelphia & Reading R. R. v. Derby*, 14 How. 483; *Northern Central R. R. v. State*, 29 Md. 420. But the rule stated in the text is not applicable when the wrongful act of the servant of the carrier is neither done in the exercise of his employment nor to one who stands to the carrier in the relation of a passenger. Thus it was held that where a brakeman on a railway train wantonly threw a stone at a boy who was trespassing on the train, and injured him, the corporation was not liable. *Pittsburg, A. & M. P. R. R. v. Donahue*, 70 Penn. St. 119. So a railroad corporation is not answerable for injuries suffered by a child by reason of the negligence of a brakeman, who, while using a hand-car of the company upon his private business, invites the child to ride upon it. *Gulf, C. & S. F. R. R. v. Dawkins*, 77 Tex. 228. Some of the decided cases would seem to fall very near the line. Thus where the servant of a railroad struck a passenger who had a quarrel with him, it was held that the corporation was not liable. *Little Miami R. R. v. Wetmore*, 19 Ohio St. 110, and see *Johnson v. Chicago, Rock Island & Pac. R. R.*, 58 Iowa, 348; *Gillian v. South & North Alabama R. R.*, 70 Ala. 268; *Flower v. Pennsylvania R. R.*, 69 Penn. St. 210. Where an unlawful expulsion from a sleeping-car berth was the proximate cause of a woman's miscarriage, the sleeping-car company was held liable although its servants were ignorant of the woman's condition when they expelled her. *Mann Boudoir Co. v. Dupre*, 4 C. C. A. 540.

when the employee is a contractor with, and not a servant of the employer, and, generally, if a person, in the exercise of his rights as a private individual, or of those conferred upon him by statute, employs a contractor to do work, and the latter is negligent in doing it, the contractor and not the employer is liable. For, when the person employed is in the exercise of an independent employment, and is not subject to the immediate supervision and control of his employer, the relation of master and servant does not exist, and the employee alone will be responsible for accidents arising from the careless exercise of the employment or work which he has contracted to do.¹ Like rules are applied as between a principal contractor and a sub-contractor employed by him.² Thus a contractor for the erection of a building who sub-contracts a portion of the work and who reserves no control or authority over, or right to direct as to the manner of performance, save generally to insist that the work be done according to the terms of the sub-contract, is not liable to a third person for an injury caused by the negligence in doing his work of the sub-contractor, who remains alone liable for the consequences of his negligence.³ Contractors erecting a building according

¹ *Detroit v. Corey*, 9 Mich. 165; *Reidel v. Moran*, 103 Mich. 262; *Reier v. Detroit Steel, &c. Works*, 109 Mich. 204; *Engel v. Eureka Club*, 137 N. Y. 100; *Colgrove v. Smith*, 102 Cal. 220; *Hilliard v. Richardson*, 3 Gray, 349; *Moline v. McKinnie*, 30 Ill. App. 419; *Jefferson v. Jameson, &c. Co.* 165 Ill. 138; *Hughbanks v. Boston Investment Co.*, 92 Iowa, 267; *Quarman v. Burnett*, 6 M. & W. 499; *Rapson v. Cubitt*, 9 M & W. 710; *Peachey v. Rowland*, 13 C. B. 182. (See *Sadler v. Henlock*, 4 El. & Bl. 570, 572.)

² *Overton v. Freeman*, 11 C. B. 867; *Bright v. Barnett, &c. Co.*, 88 Wis. 299; *Cotter v. Lindgren*, 106 Cal. 220.

³ *Slater v. Mesereau*, 64 N. Y. 138; *Johnson v. Ott*, 155 Penn. St. 17; *Sincer v. Bell*, 47 La. Ann. 1548; *Alabama Mid. R. R. v. Martin*, 100 Ala. 511. So where A., having contracted to pave a street, entered into a sub-contract with B. to do the work, A. furnishing the materials, and a workman employed by B. piled the materials in the street in a negligent manner, so that the plaintiff was injured thereby, it was held that B. was responsible for the nuisance and the resulting damage. *Overton v. Freeman, supra*. Where a sub-contractor on a building erected certain scaffolds for his own and his employees' use, and a laborer employed by the general superintendent of the work attempted to cross the scaffold solely for his own convenience, when the structure gave way, and he was killed;

to fixed plans and specifications, and of a prescribed material, are independent contractors, although the work is to be performed under the inspection and to the satisfaction of an architect acting as agent of the owner.¹ If the owner interferes with the work of an independent contractor, he may be liable for the injurious results of such interference.² Thus the owner cannot direct that a building shall be constructed of improper materials, or in an improper manner, and escape liability merely because he has contracted with a third person to build it.³ So the removal, by a city of a barrier placed by a street contractor, in compliance with his contract, relieves the contractor of responsibility for resulting accidents.⁴ The controlling test that determines is the right to exercise control, not the exercise of control: in other words, when the right of control exists, the relation is that of master and servant; when the right is merely to object, the relation is that of owner and contractor.⁵

§ 40. Rule illustrated in Actions against Corporations.— This rule has often been applied in actions brought against it was held that the defendant was not liable. *Maguire v. Magee*, 13 Atl. Rep. 551 (Penn. 1888). In an action for injuries caused by the falling of a wall erected by the defendant as an independent contractor, where it appeared that the defendant accepted the wall from a sub-contractor with knowledge of its unsafe condition, and the defendant's servants did certain work on the wall which it was alleged caused its unsafe condition, it was held that the question whether the defendant's liability was shifted to the sub-contractor was for the jury. *Berberich v. Ebach*, 131 Penn. St. 165. It is to be observed that it is always the duty of the employer to select careful and competent employees, and if he fails to do this he will be responsible for injuries resulting from the negligence of the employee, even although the employee be a contractor merely, not deriving his authority to do the negligent thing from his employer. *Connors v. Hennessey*, 112 Mass. 96.

¹ *Smith v. Milwaukee Exchange*, 91 Wis. 360.

² *Pender v. Raggs*, 178 Penn. St. 337.

³ *Meier v. Morgan*, 82 Wis. 289.

⁴ *Kulwicki v. Munro*, 95 Mich. 28.

⁵ *Atlantic Transport Co. v. Coneys*, 51 U. S. App. 570. See *Presbyterian Cong. v. Smith*, 163 Penn. St. 561; *Kerr v. Keokuk Waterworks Co.*, 95 Iowa, 509; *Hampton v. Unterkircher*, 97 Iowa, 509; *Scarborough v. Midland R. R.*, 94 Ala. 497; *Mayer v. Thompson-H. Co.*, 104 Ala. 611; *Halifax R. R. v. Shalley*, 33 Fla. 397.

municipal corporations to recover for injuries caused by the negligence of persons or their agents, who had contracted with the corporation to perform certain work, it being considered generally that the contractor alone is liable for such injuries.¹ So it is held that a municipal corporation is not liable for injuries to third persons occasioned by the negligence of workmen engaged in grading streets or digging sewers under the directions of one who has entered into a contract with the corporation to do the work for a specified sum to be paid by the corporation,² and the rule was held to be the same although the work of the contractor, before it was paid for, was to be approved in writing by the superintendent of roads.³ Where the defendant employed by a city to build a retaining wall for the purpose of widening a street, was paid by the day for his own work and that of his workmen; and, by reason of the negligence of his workmen, a traveller in the street was injured, the defendant being at the time absent, it was held that the defendant stood in relation to his workmen as master, and as such was responsible for the injury; and that the fact that the city might abandon the work at any time, at its option, was not material.⁴ Where it was stipulated between a railway corporation and a contractor to build a portion of the line, that the corporation should have the power of dismissing any of the contractor's workmen for incompetence, it was held that the corporation was not responsible for injuries received by the plaintiff through the negligence of one of the contractor's

¹ *Painter v. Pittsburg*, 46 Penn. St. 213; *Eby v. Lebanon County*, 166 Penn. St. 632; *Heidenwag v. Philadelphia*, 168 Penn. St. 72. There are cases which seem to assume that municipal corporations are affected by a peculiar immunity in respect of liability for injuries caused by acts of their contractors, so that under no circumstances can they be made liable for such injuries; see *Gurno v. St. Louis*, 12 Mo. 414; *Barry v. St. Louis*, 17 Mo. 121; but it is apprehended that a similar legal responsibility in this respect attaches alike to municipal and other corporations in all cases in which the common law creates a duty.

² *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor of New York*, 8 N. Y. 222.

³ *Kelly v. Mayor of New York*, 11 N. Y. 434.

⁴ *Geer v. Darrow*, 61 Conn. 220.

workmen. The court appear to have assumed it to be beyond question that the defendant did not stand as to the workman in the relation of an employer.¹ When a work is done for a railway company under a contract, parol or otherwise, the company is not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it and to direct what shall be done.²

§ 41. **Employee may be at the same time Servant and Contractor.** — There is not, necessarily, such a repugnance between the relations, respectively, of master and servant and of contractor and contractee that these cannot exist together.³ If the contractor undertakes in general terms to do the work and the employer reserves the power to direct what shall be done, and how it shall be done, the employer is still the principal, and is liable for the negligence of the contractor from which injury results.⁴ So the contractors for making certain excavations, while they acted for themselves, were considered to have acted at the same time as the agents of the defendant in respect of the acts complained of, so as to render the municipality liable.⁵ Where the contract is split up into different contracts, and the owner undertakes to supply the materials, and no provision is made for the supervision of the work or maintaining guards, the duty is on the owner to protect the public.⁶ On the other hand, the employee may be a servant and not a contractor although employed to do but a single act, and though he be employed by the job and not by the day. Ordinarily, if he be not a person exercising an independent calling, but an ordinary laborer, it would seem that he is to be considered a servant. Thus where a day laborer was employed to clean out a drain without assistance

¹ *Reedie v. London & Northwestern Railway*, 4 Exch. 244.

² *Steel v. Southeastern Railway*, 32 E. L. & E. 306.

³ *Detroit v. Corey*, 9 Mich. 165.

⁴ *New Orleans, Mobile & Chattanooga R. R. v. Hanning*, 82 U. S. 649.

⁵ *Detroit v. Corey*, *supra*.

⁶ *Homan v. Stanley*, 66 Penn. St. 464.

from others or direction from his employer, and received a certain sum for the job, it was held that the employer was responsible for the negligence of the laborer in doing the work.¹ A mere licensee who enters premises by the owner's permission, but solely for his, the licensee's, benefit, is not in any sense the servant of the owner, so as to charge the latter with the results of his negligence.² Nor is one who works a farm "at the halves" the servant of the owner so as to make the owner responsible for the results of his negligence.³

§ 42. **Question, in whose Right the Act is done.** — The question in all cases would seem to be whether in doing the thing complained of the employee acted in his own authority or right, or in the right of his employer. It is obvious that if he act in obedience to the paramount authority of his employer, he so far stands in the relation of a servant or agent for whose negligence the employer is responsible.⁴ So if he act under an authority granted to his employer, without which the act complained of would be unlawful, he acts in the employer's right, and under an authority which the employer cannot delegate so as to escape responsibility if the right and authority be abused.⁵ So where a contractor does the work only by virtue

¹ *Sadler v. Henlock*, 4 El. & Bl. 570.

² *Sawyer v. Martins*, 25 Ill. App. 521.

³ *Marsh v. Hand*, 120 N. Y. 315. See *Ferguson v. Hubbell*, 97 N. Y. 507.

⁴ See § 41, *ante*.

⁵ *Veazie v. Penobscot R. R.*, 49 Maine, 19. So a railroad company cannot by any stipulation with contractors relieve itself from its obligation to protect the public from danger at a point where its road interferes with or obstructs a public highway. In this case the company had stipulated that the work of constructing its road should be done "according to the plans and directions of the chief engineer of the company, to be employed and paid by the company," and the company was held liable for an injury resulting from his negligences. *Ibid*. There is a line of English cases which intimate the doctrine that when a man is in possession of fixed property, as land, or buildings, he must take care that his property is so used and managed that other persons shall not be injured, and, that, whether the property be managed by his own immediate servants, or by contractors or their servants. This is said to be upon the principle that injuries done upon the lands or buildings

of a permit granted by a city to the employer to dig up the public streets for the employer's benefit, it is held that the employer will be liable to third persons for injuries occasioned by the negligence of the contractor in doing his work.¹ So where one employed another to fill his ice-house and obtained a license from the municipality to encumber the street for

are in the nature of nuisances for which the occupant is chargeable when such injuries are occasioned by those whom he brings upon the premises. And it is said "the use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others." *Bush v. Steinman*, 1 B. & P. 404. See *Laugher v. Pointer*, 5 B. & Cr. 547, 8 D. & R. 559; *Sey v. Edgeley*, 6 Esp. 6; *Randleson v. Murray*, 8 A. & E. 109, 3 N. & P. 239. But in *Reedie v. London & Northwestern Railway*, 4 Exch. 244, 256, the court, referring to the above doctrine as laid down in *Bush v. Steinman*, *supra*, say: "On full consideration we have come to the conclusion that there is no such distinction, unless perhaps in cases where the act complained of is such as to amount to a nuisance; [see *Matthews v. West London Waterworks Co.*, 3 Camp. 403] and that . . . *Bush v. Steinman* must be taken not to be law." See also *Allen v. Hayward*, 7 Q. B. 960. In *Painter v. Pittsburg*, 46 Penn. St. 213, the doctrine of *Bush v. Steinman* is disapproved. In *Althorp v. Wolfe*, 22 N. Y. 355, 364, the same doctrine is intimated as in *Bush v. Steinman*, but no authorities are cited, and the expression appears not to be necessary to the decision of the case. The statement of the doctrine of *Bush v. Steinman* in *Lowell v. Boston & Lowell R. R.*, 23 Pick. 24, 31, appears to lose sight of the distinction laid down in the English case, and the decision of the case in Massachusetts rested upon other grounds. See *Veazie v. Penobscot R. R.*, 49 Maine, 19, as cited, *supra*. In *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, it appeared that an employee was injured by the negligence of the contractor under whom he was working, but that the accident could not have occurred had the roof of the mine been properly shored and guarded by the owners. The court held that the plaintiff was entitled to recover, upon the ground that the company, being the owners of dangerous property, it was their duty, as to all persons entering it by right, to see that it was kept safe as might be by the use of reasonable precautions, and that this duty existed as to the workmen although these were employed by an independent contractor. "By employing men to act for them in either way, they hold out the assurance that they can work in the mine on ordinary conditions of safety usually found in such places. They guarantee nothing more than is usual among prudent owners; and they do not insure against that which is purely accidental. But they do tacitly represent that they have not been and will not be reckless themselves." See § 66, *post*.

¹ *Woodman v. Metropolitan R. R.*, 149 Mass. 335. See also § 43, and cases cited.

that purpose, it was held that he could not avoid liability for injuries caused by unlawfully obstructing the street with blocks of ice, by objecting that his employee was a contractor and so alone liable; since if the contractor had been prosecuted for creating a public nuisance he could not have justified in his own right, but as the agent of the defendant under the contract.¹

§ 43. **Exceptions to General Rule in Case of Nuisance.** — If the very thing contracted to be done is in its nature mischievous and improper to be done, and reasonably certain to result in injury to others, he by whose original authority it is done will be responsible for the resulting injury, whether the person doing the act complained of stand to him in the relation of contractor or servant.² Upon this principle rests the rule

¹ *Darmstaetter v. Moynahan*, 27 Mich. 188, and see *Sadler v. Henlock*, 4 El. & Bl. 570, and § 43, *post*.

² *Mulchey v. Methodist Religious Society*, 125 Mass. 487. The principle governing the cases would seem to be that when the work contracted to be done is lawful in itself, the contractor alone is liable for the injuries resulting from his negligent manner of doing it; on the other hand, if the thing to be done is essentially wrongful, as creating a nuisance in a public way by digging a ditch therein, then the principal as well as the contractor is liable. *Ellis v. Sheffield Gas Cons. Co.*, 2 El. & Bl. 767, and see *McCamus v. Citizens' Gas Light Co.*, 40 Barb. 380; *City & Suburban R. R. v. Moores*, 80 Md. 348; *Carlson v. Stocking*, 91 Wis. 432. Compare *Wray v. Evans*, 80 Penn. St. 102. So if a building in course of erection and abutting on the public highway is left in an unsafe condition so that a traveller is thereby injured, the owner is responsible, although the building is in the hands of the contractor at the time of the accident. *Sessengut v. Posey*, 67 Ind. 408. See *St. Paul Water Co. v. Ware*, 83 U. S. 16; *District of Columbia v. Baltimore & Potomac R. R.*, 1 Mackey, 316; *Hundhausen v. Bond*, 36 Wis. 29; *Earl v. Beadleston*, 16 J. & S. 294. Where a part of a building falls without apparent reason, the owner is not relieved of responsibility because he used reasonable care in obtaining a competent contractor to do the work. A building so badly constructed as to be dangerous is a nuisance, and the doctrine of independent contractors does not apply. *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405. The owner or occupant of land who, not parting with possession, gives another a license to come upon his property to do certain acts, in the doing of which an actual nuisance is created, is equally with the licensee liable for the resulting damage. *White v. Jameson*, L. R. 18 Eq. 303. This class of cases falls under the general rule which

that if the owner or occupant of land or buildings permits another to create a public nuisance therein by reason of which a third person suffers injury, the owner remains responsible. In such a case it will be immaterial whether the person directly creating the nuisance was a servant, contractor, or mere licensee, since the gist of the action is the fact that the occupant or owner of the premises permits the nuisance to exist.¹ It was held that an action might be maintained against the defendant by one who, in passing along the street, was injured by reason of the negligence of workmen employed by persons who had contracted with the defendant to lay down water pipes, upon the ground that the defendant caused the sub-contractor to commit a public nuisance.² So a contractor laying a defective gas pipe, and the gas company knowing that it is defective, and using it, are jointly liable.³ Where the injury received by the plaintiff was by reason of a scaffold pole placed in the public highway by a sub-contractor engaged in building a bridge upon a line of railway, it was held, in an action against the principal contractor, that not he, but the sub-contractor, was liable. The court do not discuss the question whether the pole set in the highway was a nuisance, for the existence of which the railway might be liable.⁴ So if a railway company directs and procures a contractor engaged in constructing its road to commit a nuisance, it is jointly liable with the contractor therefor.⁵ It seems that this class of cases may fall also within the reason of the rule, that, where the act is done only as in the right or by the ex-

makes the owner or occupant of land responsible for its safe condition, and liable for a nuisance dangerous to the public, existing upon it, whether caused by his own act or that of a third person. See § 74, *post*, and *Gray v. Boston Gas Light Co.*, 114 Mass. 149.

¹ *Reedie v. London & Northwestern Railway*, 4 Exch. 244.

² *Matthews v. West London Waterworks Co.*, 3 Camp. 403.

³ *Lebanon Co. v. Leap*, 139 Ind. 443.

⁴ *Knight v. Fox*, 20 L. J. R. (N. S.) 65; 14 Jur. 963.

⁵ *Chicago, K. & W. R. R. v. Watkins*, 43 Kan. 50. One who contracts to do blasting in a street is not relieved from responsibility to any person injured thereby, although he has sublet the contract to a third person, through whose negligence the injury occurred. *Buddin v. Fortunato*, 31 N. Y. S. Rep. 278; and see *St. Peter v. Dennison*, 58 N. Y. 416.

clusive authority of the employer, as under the permit or license from public authority, the employer remains responsible for the consequences of the act.¹ One who causes a ditch to be dug across the travelled part of a highway, so dangerous that it probably will cause injury to third persons, is not relieved from liability for such injuries by the fact that the work of constructing such ditch was done by a contractor over whom he had no control as to the manner of doing the work.² So where a hole in the pavement in front of a stable occupied by the defendant as lessee was left open by a person who was removing manure from a pit under the pavement, under a yearly contract between him and the defendant, it was held that the defendant was liable for injuries thereby caused to third persons.³

(c) *Corporation liable for Tort of its Servants.*

§ 44. **May be sued in Trespass or Case.**—It was formerly doubted whether an action sounding in tort could be maintained against a corporation,⁴ but it is now settled that such an action will lie, and that corporations may be charged, as in trespass, for personal injuries caused by the acts of their servants done under the authority of the corporation.⁵ And

¹ See § 41, *ante*.

² *Ohio Southern R. R. v. Morey*, 24 N. E. Rep. 269 (Ohio, 1889). But it has been held that when an obstruction or defect created in a public street is wholly collateral to the work contracted to be done, and is wholly the result of the wrongful acts of the contractor who is doing the work, or of his workman, the owner of the premises is not liable for the resulting injury. *Davie v. Levy*, 39 La. Ann. 826.

³ *Hughes v. Orange County Milk Ass'n*, 56 Hun, 396, and see *Hawver v. Whalen*, 49 Ohio St. 69.

⁴ See the authorities holding this view collected in *Orr v. Bank of the United States*, 1 Ohio, 36 (1821).

⁵ *Duncan v. Surrey Canal Co.*, 3 Stark. 50; *Yarborough v. Bank of England*, 16 East, 6; *Smith v. Birmingham Gas Light Co.*, 1 Ad. & El. 526; *Sutton v. Bank of England*, 1 C. & P. 193; *Matthews v. West London Waterworks Co.*, 3 Camp. 403; *Gibson v. Inglis*, 4 Camp. 72; *Hewett v. Swift*, 8 Allen, 420; *Church of the Ascension v. Buckhart*, 3 Hill, 193; *Weed v. Panama R. R.*, 17 N. Y. 362; *Townsend v. Susquehanna Turnpike Co.*, 6 Johns. 90; *Chestnut Hill & Spring House Turnpike Co. v. Rutter*, 4 S. & R. 6. The agents of a corporation represent it both as to

this is true both as to municipal and as to private corporations.¹ Such actions, when founded upon the alleged active malfeasance of the servant, are governed by the general principle that when the master employs the servant to do an act which involves the use of force against the person of another, and the servant, in executing his employment, uses force, in a manner or to an extent unlawful or unjustifiable, both master and servant are answerable.² In such a case, the action ordinarily will be in trespass. But a corporation aggregate may be sued in an action of trespass on the case for the neglect of a public duty by reason of which the plaintiff has suffered injury.³

§ 44 a. **As to Corporations in Receivership.** — Generally, a railroad corporation is not liable for personal injuries caused

third persons and as to the servants of the corporation. *Wright v. New York Central R. R.*, 25 N. Y. 562; *Warner v. Erie R. R.*, 39 N. Y. 468; *Frazier v. Pennsylvania R. R.*, 38 Penn. St. 104; *Feltham v. England*, 2 Q. B. 33; *Gallagher v. Piper*, 16 C. B. (N. s.) 361.

¹ *Clark v. Washington*, 12 Wheaton, 49; *Baker v. Boston*, 12 Pick. 184; *Thayer v. Boston*, 19 Pick. 511; *Scott v. Mayor of Manchester*, 1 H. & N. 59.

² *Holmes v. Wakefield*, 12 Allen, 580; *Green v. London General Omnibus Co.*, 7 C. B. (N. s.) 290; *Towanda Coal Co. v. Heeman*, 86 Penn. St. 418. Trespass will lie against a corporation aggregate for an assault committed by its servant, and authorized by it to do the act, and such authority though by parol binds the corporation; and further, such an act is capable of being ratified by the corporation so as to render it liable for the act. But where the servant of the corporation took the plaintiff into custody for an alleged breach of a by-law of the corporation and carried him before a magistrate, where the attorney of the corporation attended to prosecute the charge, it was held that this was not a ratification of the servant's act. *Eastern Counties Railway v. Broom*, 6 Exch. 314. See *Marion v. Chic. R. I. & Pac. R. R.*, 59 Iowa, 428. It is held that a "Protective Department," incorporated for the protection of life and prevention of fires in a city, without capital stock or income other than that derived from compulsory assessments upon all the insurance companies doing business in the city, whether connected with it or not, was a private corporation for diminishing the cost of fire insurance to insurers, and was liable for the negligence of its servants, not being a public charity. *Newcomb v. Boston Protective Department*, 151 Mass. 215.

³ *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169.

by the negligent operation of the road while it is in the exclusive possession and control of receivers. For a receiver, appointed by a court of equity to hold, manage, and operate an insolvent railroad, is not the agent of the insolvent corporation, nor a substitute for its board of directors. He is the hand of the court which appoints him, and operates the railroad under the orders and directions of the court as its custodian, and not for the directors or shareholders of the corporation.¹ The principle is analogous to that applied to the liability of the lessor for the torts of the lessee corporation, when the lease is authorized by law.² But when, under the receivership, the railroad remains, practically, under the management of the servants of the corporation, the latter will be responsible for the results of their negligent management.³ In order to relieve the corporation of liability, the control of the property must be wholly in the receivers; and where there is a joint possession, there will be a joint liability of the company and the receivers.⁴ The receiver, being in absolute control, is liable for the negligence of his servants; and when a successor to the receiver is duly appointed by the proper tribunal, and qualified, he, in his representative capacity, becomes liable for the negligence of the former receiver, or his servants.⁵ And these rules apply whether the liability which it is sought to enforce exists at common law, or is a new liability created by statute.⁶ But the receiver, personally, is not liable for the

¹ *Memphis & Charleston R. R. v. Hoechner*, 14 C. C. A. 469; *Texas & Pacific R. R. v. Johnson*, 151 U. S. 81; *Turner v. Hannibal & St. Jo. R. R.*, 74 Mo. 602; *Ohio & Miss. R. R. v. Davis*, 23 Ind. 553; *Memphis & L. R. R. v. Stringfellow*, 44 Ark. 322.

² See § 49, *post*.

³ *Pennsylvania R. R. v. Jones*, 155 U. S. 333; *Memphis & Charleston R. R. v. Hoechner*, 31 U. S. App. 644.

⁴ *Memphis & Charleston R. R. v. Hoechner*, 31 U. S. App. 644.

⁵ *St. Louis & Southwestern R. R. v. Holbrook*, 41 U. S. App. 33; *McNulta v. Lockbridge*, 137 Ill. 270.

⁶ *Peirce v. Van Dusen*, 47 U. S. App. 339. But a receiver is not a "proprietor, owner, charterer, or hirer," within a statute giving a right of action for injuries resulting in death and caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, their servants or agents. *Allen v. Dillingham*, 60 Fed. Rep. 176, 8 C. C. A. 544, following *Turner v. Cross*, 83 Tex. 218, and see *Burke v. Dillingham*, 60 Fed. Rep. 729, 9 C. C. A. 255.

damages recovered for the negligent acts of his servants; but these are chargeable upon the earnings of the property in his hands, like operating expenses, and may be paid out of the accruing income or out of property purchased by the receiver for the legitimate uses of his trust.¹ The question whether the receiver is to be charged with negligence in any case is obviously to be determined by the same rules which would be applied were the corporation itself made defendant.² It seems that an action for injuries sustained while the railroad was in the hands of receivers cannot be maintained as against a new corporation to which the receivers, acting under authority of law, have turned over the property; it being considered that the new corporation cannot be made liable for acts done by persons who were not its servants or agents, but were put into control of the property by an adverse act.³

¹ *Cowdrey v. Galveston, H. & H. R. R.*, 93 U. S. 352; *Burnham v. Bowen*, 111 U. S. 776; *Klein v. Jewett*, 26 N. J. Eq. 474; *Mobile & Ohio R. R. v. Davis*, 62 Miss. 271; *Texas & Pacific R. R. v. Johnson*, 76 Tex. 421; *Texas & Pacific R. R. v. Huffman*, 83 Tex. 286.

² *Klein v. Jewett*, 26 N. J. Eq. 474.

³ This rule was held by a majority of the court in *Archambeau v. New York & N. E. R. R.*, 170 Mass. 272, and it was said that in that case the special grounds on which it had been thought proper to charge a corporation to the extent of the property in its hands, paid for out of income by the receiver, did not exist. It has been held in New York that a special receiver, or assignee, of the property of a railroad, appointed in bankruptcy proceedings, involuntary on its part, is not an agent or servant of the corporation, and is not liable for injuries occasioned by the negligence of his servants engaged in running the road; and that, upon the sale of the property and franchise of the railroad, the corporation as a legal entity does not vest in the purchasers, and they do not become stockholders or corporators therein; nor are they liable for injuries caused by the negligence of those operating the road between the time of the sale, and the confirmation thereof by the court which created the receivership. *Metz v. Buffalo, Corry & P. R. R.*, 58 N. Y. 61. 1 Gen. St. Kan. 1889, par. 1251, provides that "every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents," &c. A railroad being in receivership it was held that the liability thus created still attached as against the receivership. *Hornsby v. Eddy*, 5 C. C. A. 560, following the construction of the statute in *Trust Company v. Thomason*, 25 Kan. 1, and distinguishing *Beeson v. Busenbark*, 44 Kan. 669.

§ 44 *b*. **As to Charitable Corporations.** — A corporation which maintains a general hospital for sick or insane persons, which has no capital stock, and whose members derive no emolument from its operations, and the income of which is derived from trust funds contributed by charitable persons, is a public charitable corporation; and, as such, is not liable for injuries which result to a patient in its hospital solely from the negligence of its servants and agents therein, in the performance of their duties; provided the corporation has exercised due care in the selection of such servants or agents.¹ This rule is held to be analogous to that which exempts municipal corporations from liability for the negligent acts of its public officers engaged in the performance of a public duty.² It is also considered that if any contract can be inferred from the relation of the patient and the corporation, this can be only, on the part of the corporation, that it will exercise due and reasonable care in the selection of its servants and agents.³ So where a patient was injured by reason of the existence of a defect in the hospital building, though the condition was caused by the negligence of the defendant's superintendent, it was held that the corporation was not responsible.⁴ So a railway corporation which maintains a department hospital for the benefit of its employees, is not liable for the malpractice of the surgeons therein, if it has used reasonable diligence in selecting them.⁵ And it is held that a steamship corporation which provides a competent surgeon for its ship, whom the passengers may employ if they choose, without fee, is not liable for the negligence of such a surgeon in his treatment of a passenger, either at common law, or under the Federal statute which

¹ *McDonald v. Mass. General Hospital*, 120 Mass. 432; *Hearne v. Waterbury Hospital*, 66 Conn. 98; *Glavin v. Rhode Island Hospital*, 12 R. I. 411; *Downes v. Harper Hospital*, 101 Mich. 555; *Donaldson v. Hospital, &c.*, 30 N. B. 279.

² See § 56, *post*.

³ *McDonald v. Mass. General Hospital*, 120 Mass. 432.

⁴ *Benton v. City Hospital*, 140 Mass. 13.

⁵ *Eighmy v. Union Pac. R. R.*, 93 Iowa, 538; and see *Pittsburg, C. C. & St. L. R. R. v. Sullivan*, 141 Ind. 83; *Chicago, B. & Q. R. R. v. Howard*, 45 Neb. 570; *South Florida R. R. v. Weese*, 32 Fla. 46.

makes the employment of such a surgeon compulsory, under a penalty.¹

§ 45. **Corporation and Servant may be joined.** — In those jurisdictions which retain the forms of common-law pleading, a joint action of trespass or of tort in the nature of trespass² may be maintained against the corporation and its servant for a personal injury inflicted upon the plaintiff by the servant in discharging the duty imposed upon him by the corporation, although such duty might have been discharged without the use of unusual or illegal force;³ for if the corporation is chargeable in trespass for the act complained of such joinder is proper, since, in trespass, all the actors are principals, and he who commands the act may be joined with him who commits it. And if it be shown that an action of trespass would lie against the corporation as sole defendant, the right to join the servant follows as a matter of course. If the order to do the act which results in the injury complained of is given to the servant by an officer of the corporation acting by authority, such officer is not liable for the resulting injury, but the rule will be otherwise if the officer give such order on his own responsibility.⁴

¹ *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272, and see *Laubheim v. Steamship Co.*, 107 N. Y. 229; *Allan v. Steamship Co.* (N. Y. App.), 30 N. E. Rep. 483.

² It is apprehended that all actions for personal injuries may be brought either in trespass or case, but when the corporation can only be charged in case and the servant in trespass there can be no joinder. See *Parsons v. Winchell*, 5 Cush. 592, and §§ 31, 32, *ante*.

³ See *Moore v. Fitchburg R. R.*, 4 Gray, 495. And so for a wanton injury to a trespasser. *Mead v. Chic. R. I. & Pac. R. R.*, 68 Mo. App. 92.

⁴ *Hewitt v. Swift*, 3 Allen, 420.

SECTION III.

LIABILITY OF PASSENGER CARRIERS FOR ACTS OF INDIVIDUALS OR CORPORATIONS IN PRIVACY.

§ 46. **Carrier responsible for Negligence of Third Person or Corporation acting in Privacy with it.** — When a passenger, in course of transportation by a carrier, is injured by the negligence of another carrier, or its servant, acting in privacy with the first carrier, for the joint purpose of carrying on the common business, the first carrier will be responsible for the injury. For it is responsible for the safe management of its business, whether performed directly by itself, through its servants and agents, or by another carrier acting with it by arrangement or contract.¹ If the negligent act is the joint act of the two carriers, either may be answerable therefor in an action of tort, or both may be joined, or the plaintiff may sue in contract the carrier with whom he is himself in privacy.² So where a passenger in a railway car, standing on a side-track, was injured by reason of the car being struck by the car of another corporation, through the negligence of a brakeman

¹ *White v. Fitchburg R. R.*, 136 Mass. 321; *Peters v. Rylands*, 20 Penn. St. 497; *Great Western Railway v. Blake*, 7 H. & N. 987; *Buxton v. Northeastern Railway*, L. R. 3 Q. B. 547; *Thomas v. Rhymney Railway*, L. R. 5 Q. B. 266; and see *Muschamp v. Lancashire & Preston Railway*, 8 M. & W. 421; *Readhead v. Midland Railway*, L. T. 2 Q. B. 412, 4 Q. B. 378. Where two railroads have a traffic interchange of cars, and by the negligence of one of them while making such interchange an employee of the other is killed, the negligent company is liable. *Lockhart v. Little Rock & M. R. R.*, 40 Fed. Rep. 631.

² *McElroy v. Nashua & Lowell R. R.*, 4 Cush. 400; *Eaton v. Boston & Lowell R. R.*, 11 Allen, 500; *Illidge v. Goodwin*, 5 C. & P. 190. Where the management of a railroad was, at the time a person was killed by the negligence of the servants of the railroad, jointly in the hands of the trustees of the mortgage and the company purchasing from them, under a contract, retaining possession as a security for the purchase-money, but also providing that the trustees should be indemnified for losses by negligence pending the transfer of the property under the contract, both trustees and company are liable, and the plaintiff may recover against either. *Lockhart v. Little Rock & M. R. R.*, 40 Fed. Rep. 631.

of the latter corporation, employed by it to couple the two cars for the purpose of carrying out a contract between the two corporations for their joint benefit, an action was sustained as against the corporation running the car in which the plaintiff was a passenger.¹ The same rule applies when the accident is caused by the negligence of a private person in privity with the defendant corporation. Thus where a passenger was injured by a collision, and it appeared that the company owning the train had let it for an excursion to a society of persons, and that the plaintiff had purchased his ticket of the treasurer of the society, it was held that the railroad was liable, it having constituted the treasurer, *pro hac vice*, its agent.² The same rule of liability obtains although one of the corporations in privity is a foreign corporation.³ By an application of the principle stated it was held in an action against a corporation for injury caused by the negligence of its employees, that it was not a defence that the act from which the injury resulted was not authorized by the charter; if the corporation clearly recognized the act as done in its business, as by employing agents to superintend it, or receiving profits arising from it: as where a corporation chartered to operate a railroad, run in connection with the railroad a line of steamboats, by an accident occurring on one of which the plaintiff was injured.⁴

§ 47. **As to Connecting Railroads: Sleeping-Cars.** — If a railroad corporation receives upon its tracks the cars of another company, places them under the control of its own servants, and draws them by its locomotive over its road to their place of destination, it assumes towards the passengers coming upon its road in such cars the relation of a common carrier of passengers and all the liabilities incident to that relation. And this is so although the ticket entitling the passenger to a passage over the defendant road was purchased at a station

¹ *White v. Fitchburg R. R.*, 136 Mass. 321.

² *Skinner v. London R. R.*, 15 Jur. 289.

³ *Ricketts v. Chesapeake & Ohio R. R.*, 33 W. Va. 433.

⁴ *Hutchinson v. Western & Atlantic R. R.*, 6 Heisk. 634. And it was said that the fact that the State was the sole owner and stock-holder of the corporation did not exempt it from liability.

of a contiguous road, or of any other authorized agent of the defendant road.¹ But where the carrier was running its own car by license or contract over the railroad of another, having no control over such road except the right of running cars over it, it was held that the carrier running the car was not responsible for the misconduct or negligence of the servants of the corporation owning the road.² The liability of a con-

¹ *Schopman v. Boston & Worcester R. R.*, 9 Cush. 24; *Knight v. Portland, Saco & Portsmouth R. R.*, 56 Maine, 254; *Hood v. New York & New Haven R. R.*, 22 Conn. 1; *Ricketts v. Chesapeake & Ohio R. R.*, 33 W. Va. 433; *Pennsylvania Co. v. Ellett*, 132 Ill. 654. A railway corporation sold the plaintiff a ticket to a point beyond the line of its own road, upon the condition that the defendant acted only as the agent of the carrier beyond its own line, and was not responsible beyond its own line; and that the ticket should not be good for a return passage unless the owner of it should identify himself at the office of the second carrier, and unless the ticket should be properly stamped; and that the passenger should identify himself whenever requested to do so by the conductors of the road; and that no agent should have authority to vary the terms of the contract. The plaintiff presented himself at the required place and at the proper time before the departure of a train, but no agent was present to perform the service or stamp the ticket. After reaching the defendant's road, the plaintiff was ejected from the train because his ticket was not properly stamped, although he offered to identify himself to the conductor who ejected him. The contract was sustained by the Supreme Court of the United States upon the ground that the defendant was not obliged to accept the ticket until it was properly stamped, and that it was not through the fault of the defendant that no person was present to stamp the ticket at the plaintiff's place of departure. *Mosher v. St. Louis, I. M. & S. R. R.*, 127 U. S. 390. See, apparently *contra*, *Taylor v. Seaboard & Roanoke R. R.*, 99 N. C. 185; *Head v. Georgia Pacific R. R.*, 79 Ga. 358.

² *Sprague v. Smith*, 29 Vt. 421, and see *Young v. Pennsylvania R. R.*, 115 Penn. St. 112. Where the N. Company had statutory authority to run over the defendants' line, paying a certain toll to the defendants, and the signals at the point of junction between the two lines were under the control of the defendants, and by reason of the negligence of the servants of the N. Company in disobeying these signals a train of the N. Company ran into a train of the defendants, injuring the plaintiff, who was a passenger therein, it was held that he was not entitled to recover. *Wright v. Midland Railway, L. R.* 8 Exch. 137. Where there was a defect in a truck belonging to the connecting road, which defect could be detected only by a very minute examination, it was held that the defendant, upon whose track the truck was run by the connecting road,

necting carrier does not begin, and the duty of the first carrier is not completed, until there has been an actual delivery of the car to the second carrier; wherever such delivery may take place.¹ If a railway company takes passengers for transportation to points upon connecting lines, and advertises so to do without transferring passengers, its liability for accidents to passengers is limited to its own line, in the absence of any special agreement to further extend its liability.² The reason of the rule applies to cases in which the defendant's train includes cars belonging to third parties which are run by contract on the defendant's road for the mutual benefit of the owner of the car and the defendant corporation, as in the common case of sleeping-cars belonging to car companies. In the leading case upon this subject, Harlan, J., said: "The duty of the railroad company was to convey the passenger over its line; in performing that duty, it could not, consistently with the law and the obligations arising out of the nature of the business, use cars or vehicles whose inadequacy or insufficiency for such conveyance was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or to cause it to be made; if it elected to reserve or exercise no such control, or inspection, from time to time, of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars, it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor or porter, assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping-car in which [the plaintiff] was riding when injured, exercised such control with the assent of the railroad company. . . . Their negligence, or the negligence of either of them, as to any matters involving the

was not liable for an accident caused by the defect. *Richardson v. Great Eastern Railway*, L. R. 1 C. P. D. 342. See § 50, *post*. Where two railroads jointly occupy the same tracks, each is liable for the injuries which its employees negligently inflict upon the employees of the other, in the absence of contributory negligence. *Omaha & R. V. R. R. v. Morgan*, 40 Neb. 604.

¹ *Vannatta v. Central R. R. of New Jersey*, 154 Penn. St. 262.

² *Penn. R. R. Co. v. Jones*, 155 U. S. 333.

safety or security of passengers when being conveyed, was the negligence of the railroad company.”¹

§ 48. **So as to Negligence of Licensee.** — The carrier is responsible for injuries suffered by passengers through the negligence of persons or corporations who, although not in the employ of, or in privity with, the carrier, are yet acting under a license or permission from the carrier, express or implied, to do the act from the negligent doing of which the injury results. Thus where a railway corporation owned the road upon which it was running a car in which a passenger was killed by a collision, the corporation was held to be liable, although the collision was caused by the fault of another train run by the defendant's permission by another company, on the same road.² So while a passenger waiting in the proper place on a station-platform of the defendant corporation, to make a necessary change from one train to another, was injured by being struck by a mail-bag, thrown, in accordance with a custom known to the defendant, by a mail-agent employed by the United States from a mail-car of the corporation, it was held that the defendant was liable, since the accident was one which the defendant might have prevented, either by withholding the use of the mail-car or by stopping the train at the station.³

§ 49. **Railroad Leases, Effect of : Consolidations.** — If one railway corporation, without authority of law, assumes to lease its road to another, or to an individual, it remains liable for

¹ *Pennsylvania Co. v. Roy*, 102 U. S. 451, and see *Thorpe v. New York Central & H. R. R. R.*, 76 N. Y. 406; *Dwinelle v. New York Central & H. R. R. R.*, 120 N. Y. 117; *Illinois Central R. R. v. Handy*, 63 Miss. 609; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417.

² *Illinois Central R. R. v. Barron*, 72 U. S. 90, and see *Nelson v. Vermont & Canada R. R.*, 26 Vt. 717; *Chicago, R. I. & Pacific R. R. v. McCarthy*, 20 Ill. 385; *Chicago & Rock Island R. R. v. Whipple*, 22 Ill. 105, in which cases it was held that the company owning a railroad was liable for the acts of their lessees who operate the road. *Ohio & Mississippi R. R. v. Dunbar*, 20 Ill. 623.

³ *Snow v. Fitchburg R. R.*, 136 Mass. 552.

injuries caused by the negligence of such corporate or individual lessee, its servants or agents.¹ For the corporation, as being a carrier of passengers for hire, owes a duty to the public which it cannot escape by such attempted delegation although the actual negligence which causes the accident be that of the servants or agents of the corporate or individual lessee with which the actual contract of transportation is made.² This view of the law is in accordance with the principle already stated, that the primary liability of the carrier rests upon its obligation to perform a public duty and not upon the contract of transportation, independently or in the absence of which the duty may still subsist, and, further, the lease without authority of law being void, the lessee is to be considered the agent of the lessor in operating the road.³ In such a case, however, there can be no doubt that the injured party may look to the lessee with whom he has made the contract for damages for the breach of the contract, and it is likely that the lessee may be also liable for such damages, either alone or jointly with his lessor.⁴ It follows, in conformity to the principles stated, that if an incorporated railway company permits another corporation as a construction company, or an individual, to use its franchise by running passenger trains over its road, it will remain responsible for the injurious results of the negligence of the persons operat-

¹ *International & Great Northern R. R. v. Underwood*, 68 Tex. 713; *Lakin v. Willamette Valley & C. R. R.*, 13 Or. 436; *Abbott v. Johnstown, &c. Horse Railroad*, 80 N. Y. 27, Folger, J., dissenting. A railroad corporation, organized under a general railroad act, has no authority, without the consent of the legislature, to lease its road to an individual; and if it has done so, it remains responsible to the public for the manner of operating the road. See *Abbott v. Johnstown, &c. Horse Railroad*, *supra*; *Great Northern Railway v. Eastern Counties Railway*, 12 E. L. & E. 224.

² *Abbott v. Johnstown, &c. Horse Railroad*, 80 N. Y. 27; *Nelson v. Vermont & Canada R. R.*, 26 Vt. 717; *Mahoney v. Atlantic & St. Lawrence R. R.*, 63 Maine, 68; *Wasmer v. Delaware, Lackawanna & W. R. R.*, 80 N. Y. 212, and see *Redf. Railways*, § 142 and notes.

³ *Arrowsmith v. Nashville & D. R. R.*, 57 Fed. Rep. 165; *Thomas v. Railroad*, 101 U. S. 83.

⁴ See § 46, *ante*; *Baltimore & Ohio R. R. v. Rambo*, 59 Fed. Rep. 75, 16 U. S. App. 277.

ing such trains.¹ It has been held that a railway company cannot, by a mere lease of its property, absolve itself from liability for injuries caused by the negligence of its lessee, unless such exemption is provided for in the lease, and is expressly sanctioned by legislative authority; but that when such provision is made and sanction obtained, the lessee alone becomes liable for its own negligence.² And there are authorities which appear to hold, broadly, that a railway corporation leasing its road, or permitting the use of it by another, remains responsible for the negligence of the person or corporation actually managing the road, to the same extent as if the management had remained in its own hands.³ Where two railroad companies whose tracks form a continuous line consolidate by authority of law, they cease to exist and a new corporation is formed, which comprehends them both, and which is liable for injuries for which one of the original companies was liable before the consolidation, since the combining companies could not, by a contract between themselves, conclude the rights of persons who had been injured by their torts.⁴

§ 50. **Certain Statute Limitations of the Rule.**—Although, generally, the carrier will be liable to a passenger for injuries caused by the negligence of its servants, or of a third person or corporation managing or operating its line, or for the injurious results of any defect in its appliances for doing its business which might have been discovered in season to prevent the accident, or, perhaps, for defects which were latent in the means and appliances and so not discoverable

¹ *Chattanooga, R. & C. R. R. v. Whitehead*, 89 Ga. 190. But a railroad is not responsible for negligence in the management of a locomotive when, at the time of the accident, it, and its crew, were rented to and under the control of another railroad. *Byrne v. Kansas City, &c. R. R.*, 61 Fed. Rep. 605, 9 C. C. A. 666.

² *Driscoll v. Norwich & Worcester R. R.*, 65 Conn. 230 (by a majority of the court).

³ *Aycock v. Raleigh, &c. R. R.*, 89 N. C. 321; *Norton v. North Carolina R. R.*, 122 N. C. 910; *Benton v. North Carolina R. R.*, 122 N. C. 1007; *Central R. R. v. Phinazee*, 93 Ga. 488.

⁴ *State v. Balt. & Lehigh R. R.*, 77 Md. 489.

on inspection, although the defendant did not construct the defective road or vehicle;¹ yet there is a class of cases in which the liability of the carrier is limited by the terms of the statute creating the liability so that he will be answerable only for specific and actual negligence on the part of himself or his servants. Thus in the Public Statutes of Massachusetts, c. 112, sec. 212, providing a remedy, civil or criminal in form, when, by the negligence of a carrier the life of a passenger is lost, such remedy to be pursued by the administrator of the deceased passenger, it is provided that damages shall be assessed "with reference to the degree of culpability of the corporation, or of its servants or agents." In a case in which action was brought to recover for the death of persons who had been killed by reason of defects existing in the road-bed of a railroad owned by the Commonwealth but operated by the defendant corporation as the agent of the Commonwealth, the defect not being discoverable on ordinary inspection and having existed before the defendant corporation took possession of the road, the court said, "This language imports that there must be some degree of culpability on the part of the corporation or of its servants, and is not satisfied by showing that the corporation assumed a contractual or quasi contractual responsibility for third persons who were not its servants. Suppose, for instance, that the defect in the construction of the road was unknown, both to the defendant and to the Commonwealth, and could not have been discovered by either through the use of any degree of care, the fact that it was known to the private corporation that originally built the road could not be said to show culpability on the part of the defendant, except by a wilful misapplication of words. . . . Suppose that the defect was known to the Commonwealth, and was not known and could not have been known to the defendant, the defendant was not negligent, whatever might have been the liability at common law."²

¹ See *Grote v. Chester & Holyhead Railway*, 2 Exch. 251, 255; *Francis v. Cockrell*, 5 Q. B. 184, 501; *Hegeman v. Western R. R.*, 13 N. Y. 9; *Philadelphia & Reading R. R. v. Anderson*, 94 Penn. St. 351, 359; *Pendleton v. Kinsley*, 3 Cliff. 416, 421; *Richardson v. Great Eastern Railway*, L. R. 1 C. P. D. 342, as cited, § 47 *n.*, *ante*.

² *Littlejohn v. Fitchburg R. R.*, 148 Mass. 478.

SECTION IV.

OF THE LIABILITY OF PUBLIC OFFICERS.

§ 51. **Rule of *Respondeat Superior* does not apply to.** — The doctrine of *respondeat superior*, being founded upon the supposition that the master derives some benefit from the act of the servant, does not apply to a public officer as to the agents whom he employs in the discharge of a public duty.¹ Thus the clerks of commissioners intrusted with the conduct of public works are not liable in damages for an injury caused by the negligence of artificers in constructing such works employed under their authority.² So it is held, generally, that municipal corporations are not liable for the negligence of surveyors or other officers intrusted with the construction or maintenance of highways, such officers being employed under a general law to perform services in which the corporation has no particular interest and from which it derives no especial emolument or advantage.³ And the trustees of a public road empowered by law to make contracts for cleaning the road and to light it at night, are not liable for the negligence of their agents employed by them for this purpose.⁴ So where the statute imposed upon school committees, generally, the duty of keeping the public schoolhouses in repair, and of providing all things necessary for the comfort of the pupils attending school in them, it was held that such a committee might lawfully order a tree on a schoolhouse lot to be cut down, and that the committee was not liable for the neg-

¹ McKenna v. Kimball, 145 Mass. 555; Jewett v. New Haven, 38 Conn. 368; Torbush v. Norwich, 38 Conn. 225; Hardy v. Keene, 52 N. H. 370; Edgerly v. Concord, 59 N. H. 341, 62 N. H. 8; Wakefield v. Newport, 60 N. H. 374, 62 N. H. 624; Heller v. Sedalia, 53 Mo. 159.

² Hall v. Smith, 2 Bing. 156, and see also Humphreys v. Mears, 1 Man. & R. 187.

³ White v. Phillipston, 10 Met. 108; Walcott v. Swampscott, 1 Allen, 101; Hafford v. New Bedford, 16 Gray, 297; Hennessey v. New Bedford, 153 Mass. 260; McCann v. Waltham, 163 Mass. 344; but see Denver v. Williams, 12 Col. 473.

⁴ Harris v. Baker, 4 M. & S. 27.

ligence of the persons whom they had employed to execute their order.¹ As a general rule, persons intrusted with the performance of a public duty as trustees for public purposes, discharging it gratuitously, and not being personally guilty of negligence, are not responsible for injuries sustained by an individual through the negligence of workmen employed under them.² In the absence of a statutory remedy, either express or arising by necessary implication, municipal corporations are not liable for damages resulting in loss of life from the acts of mobs or riotous assemblies, no matter how negligent the officers of the municipality may be.³

§ 52. **When Personally liable.** — When an injury is suffered by the act of a public officer not done within the scope of his authority as an officer, or by the act of his private servant or agent, not done in the performance of the officer's public duty, or if the officer do negligently that which it is his duty to do, the injured person may have an action against him.⁴ But the right of action is carefully limited. It has been said: "When the law renders a public officer liable to special damages for neglect of duty, the cases are those in which the services of the officer are not gratuitous or coerced, but voluntary, and attended with compensation, and where the duty to be performed is entire, absolute, and perfect."⁵ And, in order to make the officer responsible, the duty imposed upon him must be a personal and ministerial duty, and one which he is under

¹ *McKenna v. Kimball*, 145 Mass. 555. So a town is not liable to a traveller injured by the falling of a flagstaff, in a highway, which employees of the selectmen of the town were engaged in taking down, *Wakefield v. Newport*, 62 N. H. 624; nor is a city liable for the negligence of a driver of a street sprinkling cart, *Conelly v. Nashville*, 100 Tenn. 262.

² See § 44 *b*, *ante*, and cases cited; *Duncan v. Findlater*, 6 Cl. & Fin. 894; *Holliday v. St. Leonards*, 11 C. B. (N. S.) 192.

³ *Gianfortone v. New Orleans*, 61 Fed. Rep. 64; *New Orleans v. Abbagnato*, 23 U. S. App. 533.

⁴ *Hall v. Smith*, 2 Bing. 156; *Jones v. Bird*, 5 B. & Ald. 837; *Humphreys v. Mears*, 1 Man. & R. 187; *Bartlett v. Crozier*, 15 Johns. 250, 17 Johns. 450; *Bailey v. Mayor of New York*, 3 Hill, 581; *Sawyer v. Corse*, 17 Gratt. 230; *Butler v. Ashworth*, 102 Cal. 663.

⁵ *Kent, C.*, in *Bartlett v. Crozier*, 17 Johns. 439, 450.

the obligation and clothed with the authority to perform, both in the means furnished him and the legal authority to act without the control of superior officers.¹ Thus it has been held that the selectmen of a town who are engaged in building a public sewer in one of its streets, are liable for injuries caused to a person employed by them to lay a pipe in the bottom of a trench, by reason of their failure to provide a proper support for the sides of the trench; and the court say: "In building the sewer, they were performing a ministerial duty for the benefit of the town. . . . The sewer when built belonged to the town; but its construction was not authorized by the town in the performance of a duty imposed by general laws upon it and other towns, and upon cities, for the general benefit, like those, for instance, requiring schools for children between certain ages."² It has been intimated that, in order to support an action, there must have been active misfeasance on the part of the officer, but it is believed that this doctrine is not supported by the weight of authority.³

¹ *Nowell v. Wright*, 3 Allen, 166.

² *Breen v. Field*, 157 Mass. 277. Where the exclusive control of common sewers in a city was delegated to the board of aldermen, but the sewers, when constructed, became the property of the city, it was held that the board of aldermen acted as the agents of the city, and that the city was liable for any negligence in the course of construction by which injury was caused to another. *Murphy v. Lowell*, 130 Mass. 564. See § 56, *post*.

³ See *Nowell v. Wright*, *supra*. But in this case an action was supported against a drawtender, appointed by the governor, who had opened the draw in an improper manner, and so injured the plaintiff, the act of the defendant being held not non-feasance merely but active misfeasance. In *Williams v. Adams*, 3 Allen, 171, it was held that a prisoner confined under sentence in a house of correction, could not maintain an action against the master thereof for neglect to provide him clothing and fire, whereby he was injured, in the absence of proof of express malice, or such gross negligence as to authorize the inference of malice on the part of the defendant.

SECTION V.

OF THE LIABILITY OF MUNICIPAL CORPORATIONS AT COMMON LAW.

(a) *Of Quasi Corporations, generally.*

§ 53. **Not liable at Common Law, in the United States, Reasons of the Rule.** — The great weight of American authority is in favor of the rule that a private action cannot be maintained against a town, county, or other *quasi* public corporation, for the neglect of a public duty, or of a duty imposed alike on all similar corporations, unless the liability to such an action is expressly created by statute.¹ This rule rests, primarily,

¹ *Mower v. Leicester*, 9 Mass. 247; *White v. Phillipston*, 10 Met. 108; *Sawyer v. Northfield*, 7 Cush. 490; *Bigelow v. Randolph*, 14 Gray, 541; *Hill v. Boston*, 122 Mass. 344; *Adams v. Wiscasset Bank*, 1 Greenl. 361; *Reed v. Belfast*, 20 Maine, 246; *Mitchell v. Rockland*, 52 Maine, 118; *Farnum v. Concord*, 2 N. H. 372; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114; *Hyde v. Jamaica*, 27 Vt. 443; *State v. Burlington*, 36 Vt. 521; *Buchanan v. Barre*, 66 Vt. 129; *Willett v. St. Albans*, 69 Vt. 330; *Chidsey v. Canton*, 17 Conn. 475; *Taylor v. Peckham*, 8 R. I. 349; *Bartlett v. Crozier*, 17 Johns. 439; *Sussex Freeholders v. Strader*, 18 N. J. L. 108; *Niles Commissioners v. Martin*, 4 Mich. 557; *Hamilton Commissioners v. Mighels*, 7 Ohio St. 109 (overruling *Brown Commissioners v. Butt*, 2 Ohio, 348); *Barnes v. District of Columbia*, 91 U. S. 440 (and see cases cited, *post*, §§ 60 *et seq.*); *Hedges v. Madison*, 6 Ill. 567; *Waltham v. Kemper*, 55 Ill. 346 (overruling *South Ottawa v. Foster*, 20 Ill. 296); *Bussell v. Steuben*, 57 Ill. 35; *White v. Bond*, 58 Ill. 297. In *Deane v. New Milford*, 5 W. & S. 545, it was held that an action would lie at common law against a township to recover damages sustained by reason of the failure of its supervisors to keep a road in repair, and this doctrine seems to have been followed in later cases in Pennsylvania. See *Humphrey v. Armstrong*, 56 Penn. St. 204; *Rapho v. Moore*, 68 Penn. St. 404. So in Maryland, under the constitution and laws of that State, charging the commissioners of counties with the duty of maintaining roads and bridges, it was held that, this duty being imposed by statute and no penalty being prescribed for the non-performance of it, the right of action accrued at common law to the person injured by the breach of duty, since otherwise there would be a violation of right without a remedy. *Anne Arundel Commissioners v. Duckett*, 20 Md. 468. It is said, in Indiana, that the rule that counties are liable for injuries caused by defects in bridges which they are bound to keep safe, but negligently fail so to do, is the law of that State although there is no statute creating such liability. See *Parke County v. Wagner*, 138 Ind. 609.

upon the ground that, generally, in the United States, there exists no contract, express or implied, between the State and the several counties, towns, or townships into which it is subdivided ; and no grant of any special power or privilege, which can be supposed to have been voluntarily accepted by the *quasi* corporation upon the condition of its performing the public duty. Such *quasi* corporations are considered as involuntary territorial and political divisions of the State, established for purposes of government and municipal regulation ; so that those cases are not to be regarded as authorities upon the question of liability which have been decided upon a distinction between the exercise of special powers and the exercise of the general powers which belong alike to all *quasi* public corporations, or upon the ground that the special powers granted are in the nature of privileges, which have been accepted upon the implied condition of performing the public duties growing out of them.¹

§ 54. **Same Subject.**— Thus the rule, except in so far as it rests upon the general principles of the common law, arises out of the peculiar conditions of municipal existence in the United States, which conditions do not exist in England. It is said : “ There is no uniformity in the powers and duties of English municipal corporations. . . . The powers and duties of each municipality depend on its own individual grant or prescription. Their corporate franchises are held of the crown by the tenure of performing the conditions upon which they have been granted, and are liable to forfeiture for breach of the conditions. . . . They are not, like towns, general political and territorial divisions of the country, with uniform powers and duties, defined and varied, from time to time, by general legislation. Towns do not hold their powers, ordinarily, under any grant from the government to the individual corporation ; or by virtue of any contract with the government, or upon any condition express or implied.” And so, “ in England, where a public duty is imposed on a municipal corporation as a condition upon which the corporate franchises or corporate property have been granted ; or where

¹ *Eastman v. Meredith*, 36 N. H. 284.

the corporation holds its franchises or property by a prescription from which a grant or like condition, may be inferred, it has been held that any individual may maintain an action against the corporation to recover damages for an injury which he has suffered from neglect to perform the public duty."¹

§ 55. **Applications of the Rule.** — The rule has been applied to actions for injuries occasioned by the negligent or defective construction of buildings erected by a county or town, pursuant to a duty imposed upon the municipality by a general law for public objects.² Thus a county was held not to be liable to an action for the negligent or improper construction of a court-house by reason whereof a witness summoned to attend court therein was injured.³ Assuming it to be the duty of a town to provide a safe and suitable place for a town meeting, yet a citizen who suffers a private injury in the exercise of his public rights by reason of the neglect of the town to fulfil its duty in this regard, cannot maintain an action against the town to recover damages for the injury.⁴ Nor is a town which has erected a school-house, in the performance of a duty imposed upon it by a general law, liable to an action for an injury sustained by a scholar attending school in the building caused by its imperfect or dangerous construction,⁵ or by a dangerous excavation left in the school-house yard.⁶

¹ Per Perley, J., in *Eastman v. Meredith*, 36 N. H. 284, and see *Detroit v. Blackeby*, 24 Mich. 84, as cited, § 60, *post*. In actions by or against *quasi* corporations, as towns, having no corporate funds, each inhabitant or corporator is a party to the action, because his private property is subject to be taken to satisfy the judgment to be obtained in the action. The case is otherwise as to corporations proper, because, in case of judgment obtained against these, no property is subject to be taken except the corporate property. *Adams v. Wiscasset Bank*, 1 Greenl. 361.

² *Sussex Freeholders v. Strader*, 18 N. J. L. 108.

³ *Hamilton Commissioners v. Mighels*, 7 Ohio St. 109.

⁴ *Eastman v. Meredith*, 36 N. H. 284.

⁵ *Hill v. Boston*, 122 Mass. 344. So as to a City Hall provided for the use of municipal officers, *Snider v. St. Paul*, 51 Minn. 466.

⁶ *Bigelow v. Randolph*, 14 Gray, 541. It is held that a city is not liable for the negligence of its firemen in driving a hose-carriage against

A municipality discharging the public duty of maintaining an insane asylum, is not liable to one of its employees for the negligence of another in carrying on the work of the asylum.¹ The rule has often been applied in the case of actions brought against municipalities for injuries received by reason of defects in highways and bridges. And although the statute imposes upon the town the duty of keeping its highways safe and convenient for travellers, and provides a remedy by action for one injured by the failure of the town so to do,² the town will not be liable for maintaining or permitting a common nuisance to exist within the limits of the highway, unless this constitute a dangerous defect.³ So if a traveller sustain damage by reason of the negligence of an abutter on the highway, the town is not answerable therefor under a statute which requires the town to keep the highway in repair, unless the act of the abutter cause an obstruction or defect in the way.⁴

§ 56. **Rule of *Respondeat Superior* applied to Municipal Corporations.** — Since a corporation can act only by its servants and agents, it is obvious that the negligence of such servants and agents is the negligence of the corporation. But the rule of *respondeat superior* does not apply as to the acts of a public officer, or his agent, engaged in the discharge of a public duty.⁵ Thus where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service in which the corporation has

the plaintiff, *Hafford v. New Bedford*, 16 Gray, 297 (and see *Fisher v. Boston*, 104 Mass. 87; *Tainter v. Worcester*, 123 Mass. 311); nor to its employee for an injury caused him by the negligent construction or management of its fire-signal system. *Pettingell v. Chelsea*, 161 Mass. 368.

¹ *Hughes v. Monroe County*, 147 N. Y. 49. See § 44 *b*, *ante*.

² See §§ 166 *et seq.*, *post*.

³ *State v. Burlington*, 36 Vt. 521. But a dangerous nuisance existing in a highway is a defect for which the municipality is responsible. *Hewison v. New Haven*, 37 Conn. 475. See cases cited, §§ 174 *et seq.*, *post*.

⁴ *Taylor v. Peckham*, 8 R. I. 349.

⁵ See § 51, *ante*.

no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of its inhabitants or of the community, such officer cannot be regarded as the servant or agent of the municipality, for whose negligence or want of skill in the performance of his duties the municipality can be held liable. To the acts or conduct of an officer so appointed or elected, the maxim *respondeat superior* is not applicable.¹ The rule has often been applied in Massachusetts, in cases of accidents arising from the alleged negligence of road surveyors appointed under a general law, their servants or agents;² and so as to road commissioners elected by a town under statute authority;³ or a superintendent of streets in a city elected by the board of aldermen, under a mandatory provision in the city charter.⁴ But where the officials placed in charge of the streets are appointed under the direction of the immediate government of the municipality, and so are the mere instruments to perform for the municipality its corporate functions, the municipality is liable for the negligence of such officials.⁵ As the rule is sometimes stated, the

¹ Walcott v. Swampscott, 1 Allen, 101.

² White v. Phillipston, 10 Met. 108; Walcott v. Swampscott, 1 Allen, 101; Hafford v. New Bedford, 16 Gray, 297; Murphy v. Lowell, 124 Mass. 564; Hennessey v. New Bedford, 153 Mass. 260.

³ McManus v. Weston, 164 Mass. 263.

⁴ Jensen v. Waltham, 166 Mass. 344.

⁵ Bieling v. Brooklyn, 120 N. Y. 98. And it was held in this case that the fact that a statute purported to exempt the municipality from liability for any misfeasance or nonfeasance of its common council, or of any of its city officers, did not relieve it from liability for its failure to discharge any of its corporate functions, one of which was the duty of keeping its streets in repair. Where the common council of a city had power to open, alter, and keep in repair streets, and to raise money by taxation to provide for the expense of the same; but a street commissioner was elected by the people and was apparently not subject to be removed by the council, to whom was committed the care of streets and sidewalks and the duty of keeping them in repair and free from defects; it was held, notwithstanding, that the commissioner was simply an agent of the municipality, which remained liable for injuries arising from defects in streets or sidewalks; especially in view of the fact that the city charter provided that written notice of such injuries should be given

municipality is liable for the negligence of its agents in the exercise of merely ministerial powers, but not in the exercise of judicial discretion. Thus the municipality, by its agents, acts judicially in adopting a plan of public improvement, and ministerially in carrying it out.¹ Thus where the ordinance of a city prescribes the manner in which certain work requiring excavations in its streets shall be done, requires that an officer of the city shall supervise the work, the failure of such supervision will render the city liable for resulting accidents.²

(b) *Of Certain Exceptions to the Rule.*

§ 57. **Possible Exception to the Rule in Cases of Misfeasance.**—There are cases which hold that a municipal corporation, whether it be a *quasi* corporation or an incorporated city or town, may be liable at common law for personal injuries which result from the negligence of its servants or agents in doing a work requiring special care, such negligence being something more than a mere omission of duty.³ Thus it was held in New York that a city was liable for the negligence of its servants in building a bridge, under the authority of the legislature, although the duty of maintaining and keeping the bridge in repair was imposed by law upon private parties; that is, upon the pier proprietors.⁴ But it is to be observed

in writing to the mayor or council in order to entitle the injured party to maintain an action. *Denver v. Williams*, 12 Colo. 473. The duty to repair streets, having once accrued, cannot be avoided because auxiliary powers are subsequently conferred by statute upon the police department. *Kunz v. Troy*, 104 N. Y. 344. Where an accident occurred in front of property belonging to the city, but in charge of commissioners appointed by the governor of the State, it was held that it was the duty of the city to keep the sidewalk in repair. *Osborne v. Detroit*, 32 Fed. Rep. 36.

¹ *Chicago v. Seben*, 165 Ill. 371; *Love v. Raleigh*, 116 N. C. 296.

² *Augusta v. Cone*, 91 Ga. 714. A municipality, having the general power to construct sewers, cannot be permitted to allege as an excuse for its negligence in such construction, whereby a person, employed in the construction by its officials, is injured, that the sewer was not legally established. *Norton v. New Bedford*, 166 Mass. 48. See *Coan v. Marlborough*, 164 Mass. 206.

³ *Detroit v. Blackeby*, 21 Mich. 84.

⁴ *Cunliff v. Mayor of Albany*, 2 Barb. 190. See *Weet v. Brockport*, 16 N. Y. 161.

that the later cases in New York do not admit any distinction in principle, but hold generally, in cases of highway accident, that an incorporated municipality is liable at common law to one injured by a defect in a highway, whether such defect be the result of the defendant's misfeasance or of mere nonfeasance.¹ In Massachusetts, however, where the liability of all municipalities is considered to be derived from the statute only, it was held that a town was liable at common law for personal injuries caused by the negligence of its agents in building a bridge. The court reaffirmed the general rule, as often laid down in Massachusetts, that a private action will not lie against a town to recover damages sustained in consequence of the negligence of its agents in the performance of a duty which, under the requirement or authority of law, the town has assumed with a sole view to the general benefit, unless such action is given by statute, but declared that the duty of building a road or bridge did not fall within the rule, and that when the town, voluntarily or by compulsion, had assumed that duty, it would be responsible for the negligence of its servants and agents engaged in the work.²

¹ See cases cited § 61, *post*.

² *Doherty v. Braintree*, 148 Mass. 495. Whether or not the distinction recognized in this and other cases is to be justified upon general grounds, the reasoning upon which the court in Massachusetts rests the distinction does not seem to be clear. The court cited, as authority to the point decided, a line of cases in which the cause of action was not neglect in the performance of a public corporate duty, rendering a public work, as a road or bridge, defective, and so unfit for the purpose for which it was designed, but the doing of a wrongful act causing a direct injury to the property of another, outside the limits of the public work; in which cases the municipality is, at common law, liable to an action of tort to the same extent that any corporation or individual would be liable for similar acts. Thus if, in constructing or maintaining a bridge or culvert, the municipality causes water to flow back or injure the land of another, it is liable. See *Anthony v. Adams*, 1 Met. 284; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 Gray, 544; *Wheeler v. Worcester*, 10 Allen, 591; *Stackhouse v. Lafayette*, 26 Ind. 17; *Ross v. Madison*, 1 Ind. 281. The same rule is applied in the case of sewers. *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223; *Hildreth v. Lowell*, 11 Gray, 345; *Haskell v. New Bedford*, 108 Mass. 208; *Delmonico v. Mayor of New York*, 1 Sandf. 226. Other cases in which

§ 58. **Acts done for Special Benefit or Emolument.** — It is obvious that every municipality, whether it be a *quasi* corporation merely, as a town or county, or whether it exist by virtue of a special act of incorporation, is invested with and exercises two kinds of powers, the one governmental and public as being an attribute of sovereignty, and the other private, these being held in the same manner and subject to the same liabilities as would attend their exercise by a private person.¹ And in so far as the municipality exercises its *quasi* private right, as in making contracts or entering into employments for its own benefit, it becomes liable at common law in the same manner and to the same extent as would a private person entering into like relations, or engagements. In other words, when the municipality owes a specific duty to an individual, an action will lie for a breach of that duty whenever such breach has occasioned an injury to the individual; but if the corporation owe a duty to the public, for a neglect to perform it, there is no private remedy at common law.² Thus if the municipality engage in an enterprise which, although for the benefit of all the individuals composing it, is not undertaken in the discharge of a public duty but for its own benefit, advantage, or emolument, as by receiving rents or otherwise, in the same way that a private owner might do;³ in such a case the municipality may be held liable in the same way as a private owner might be liable

this rule has been applied in Massachusetts are *Hawks v. Charlemont*, 107 Mass. 414; *Deane v. Randolph*, 132 Mass. 475, and *Waldron v. Haverhill*, 143 Mass. 582. The rule governing these cases was discussed in the leading case in Massachusetts of *Hill v. Boston*, 122 Mass. 344, 358, and it seems that they are clearly to be distinguished from the case of *Doherty v. Braintree*. Other cases in which municipal corporations have been held liable for consequential injuries to property caused by the negligent construction of a public work are *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Mills v. Brooklyn*, 32 N. Y. 489; *Barton v. Syracuse*, 36 N. Y. 54; *Rhodes v. Cleveland*, 10 Ohio St. 159; *McCombs v. Akron*, 15 Ohio, 474.

¹ *Lloyd v. Mayor of New York*, 1 Selden, 374.

² *Sussex Freeholders v. Strader*, 18 N. J. L. 108.

³ *Scott v. Mayor of Manchester*, 2 H. & N. 204, 210; *Bailey v. Mayor of New York*, 3 Hill, 531, 539; *Western Savings Fund Society v. Philadelphia*, 31 Penn. St. 185, 189; *Barron v. Detroit*, 94 Mich. 601.

whose negligence in the management or use of his property causes an injury to another.¹ So where a building belonging to a city was used in part for municipal purposes, but in considerable part as a source of revenue, being let for rent, it was held that the city might be liable for injuries resulting from the defective approaches to the building, these being within the control and care of the city.² So where the municipality derived a profit from the carrying on of gas works and a private person was injured by the negligence of its servant engaged in laying the gas pipes, the corporation was held responsible for the injury.³ So where a municipal corporation was granted a special power to supply water and gas and to charge rates for the use thereof, it was held responsible for the negligence of its agents in carrying out this power.⁴ And where the electrical bureau of a city is a part of the revenue producing department, its employees are the servants of the city and the maxim *respondeat superior* applies.⁵ A municipality constructing a sewer, from which

¹ *Hill v. Boston*, 122 Mass. 344; *Eastman v. Meredith*, 36 N. H. 289-294; *Weet v. Brockport*, 16 N. Y. 161 n.

² *Oliver v. Worcester*, 102 Mass. 489. See *Thayer v. Boston*, 19 Pick. 511; *Buchanan v. Barre*, 66 Vt. 129. Where a city was held liable for an injury caused by the falling of a decayed limb from a tree in a public park, the charter of the city giving it the exclusive control of the public parks, the decision was upon the ground that the duty to keep the parks in a safe condition for public use and travel was strictly a private duty. *Jones v. New Haven*, 34 Conn. 1, as explained in *Hewison v. New Haven*, 37 Conn. 475. On the other hand, it was held that a city engaged in constructing a public school-house upon its land is not liable for injuries occasioned to a traveller upon an adjoining highway through the negligence of the servant of the city in blasting rock while excavating for the foundation, since both the duty of building the school-house and of keeping the highway safe are public duties. *Howard v. Worcester*, 153 Mass. 426. Where a city was filling up an abandoned public reservoir for the purpose of using the land for some valuable and profitable purpose, it was held to be liable for the negligence of its servants in charge of the work in the same manner as a private owner would be. *Clark v. Manchester*, 62 N. H. 577.

³ *Scott v. Mayor of Manchester*, 1 H. & N. 59, 2 H. & N. 204. See *Coe v. Wise*, 5 B. & S. 440, 475.

⁴ *Mayor of New York v. Furze*, 3 Hill, 612.

⁵ *Bodge v. Philadelphia*, 167 Penn. St. 492.

under its charter it may derive an income, is liable for its negligence in the manner of doing the work;¹ and, in Massachusetts, it is said to be the settled rule that, because sewers are built and maintained partly for the private benefit and advantage of the abutters, who pay in part for such advantages, and because the charge of sewers is not an obligation imposed by law without the assent of the municipality, but voluntarily assumed, a municipality is liable to a private action for negligence in building and maintaining them.² The defendant corporation was held liable for a personal injury suffered from the dangerous and negligent construction of machines in a wash-house, which it had been authorized by statute to erect, and for the use of which the plaintiff and others paid compensation.³ A municipal corporation using an ice boat to clear the channel in its harbor, but which, by authority of its charter, permits such boat to be used in towing operations for its own gain, assumes the responsibility for accidents occurring during such towage, by the negligence of its officers.⁴ Where a farm attached to an almshouse was carried on by the town so as to produce a profit, it was held that the town was responsible for an accident occurring through the negligence of its agent who managed the farm.⁵ But the fact that a city will derive an

¹ *Ostrander v. Lansing*, 111 Mich. 693.

² *Child v. Boston*, 4 Allen, 41; *Murphy v. Lowell*, 124 Mass. 564; *Coan v. Marlborough*, 164 Mass. 206.

³ *Crowley v. Mayor of Sunderland*, 6 H. & N. 565. For illustrations of the rule in cases of injuries to property, see *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, 11 H. L. Cas. 686; *Parnaby v. Lancaster Canal*, 11 A. & E. 223, 3 N. & P. 523, 3 P. & D. 162.

⁴ *Philadelphia v. Gavagnin*, 17 U. S. App. 642.

⁵ *Neff v. Wellesley*, 148 Mass. 487. Upon the general principle that municipal corporations are not liable to private actions for omissions or neglect in the performance of a public duty imposed upon them by law, or for that of their servants engaged therein, when such corporations derive no benefit therefrom in their corporate capacity, it was held in Massachusetts, that a city was not liable for personal injuries occasioned to an inmate of its House of Industry by the negligence of the officers and servants employed by its board of directors of public institutions to administer the affairs of the House of Industry, although, at the time of

incidental advantage or profit from the construction of a street through its own land, by reason of an increase in the

the injury, such inmate was engaged in labor from which the city derived a profit. It was contended, on the part of the plaintiff, that although the institution was maintained by the city primarily for the public benefit, yet that it had embarked in an enterprise partly commercial, and so should be held liable. The court said that it did not "perceive any reason why the city should be held responsible because some income is derived from the labor of the inmates. It is required by the statute that these inmates should be kept at work, but the institution is not conducted with a view to pecuniary profit. It is not suggested that the expenses of maintaining the workhouse are met by what is derived from the labor of the inmates, or that any profit above them is made. Even if the entire expense is not met by taxation by reason of the profit thus derived, such profit is purely incidental. The object and purpose of the workhouse and the conduct of it are not thus shown to be of the nature of a business. It only appears that as a public institution it is managed in a judicious and economical manner." *Curran v. Boston*, 151 Mass. 505. In *Bailey v. Mayor of New York*, 3 Hill, 581, the water commissioners of the city of New York, who had made a contract with third persons to build a dam on the Croton River, for the purpose of creating a water supply, were held, under the special act authorizing the city to do the work, to be the agents of the corporation, which therefore was held liable for injuries occasioned by the negligence of the workmen employed in the work. In this case it was considered that, in exercising the powers conferred by the act, the city was engaged in an enterprise for private emolument just as a private individual might be. The doctrine stated in the text has been given a very broad application in certain cases which hold that the emolument to be derived from the work or business, in order to charge the municipality with liability in respect of it, need not be direct or ascertainable, or even accrue into the public treasury. Thus a municipal corporation was held liable for undermining a brick wall in grading a street under the authority of special statutes, and it was said that the acts were accepted "because of the benefit which the corporation expects to receive, not by making money directly, but by making it more convenient for individuals, . . . and to benefit them by holding out greater inducements to others to frequent the town. The only distinction is that in one case the money is received directly, in the others indirectly." *Mears v. Wilmington Commissioners*, 9 Ired. 73, and see also *Cunliffe v. Mayor of Albany*, 2 Barb. 190. In the case of *Smoot v. Mayor of Wetumpkee*, 24 Ala. 112, the defendant corporation was held liable for injuries occasioned by a defect in a bridge in a highway which it was made by statute the duty of the defendant to maintain. The act provided that "the inhabitants of the said city shall be excused from working on roads and highways out of said city, and from patrol duty, except under the authority of said city;

value of the land, is not ground to support an action in behalf of one who while engaged in the construction of the street under the direction of the defendant's superintendent of streets, receives personal injuries.¹

§ 59. **Duties depending on Condition or Prescription in England.** — It has been observed that the powers and duties of a municipal corporation in England depend upon the conditions with which it receives its delegation of sovereignty from the crown, and that the tenure of each corporate existence depends upon its observance of these conditions. When the municipality exercises a power arising from a special grant, it is affected with a correlative duty, for the breach of which it will be liable to any person who thereby suffers harm. Thus where the corporation held the franchise of a borough, and also of a quay, with the right to take tolls under a grant from the crown, by the terms of which it was bound to keep in repair a sea-wall; it was held that the corporation was liable for injuries suffered by one by reason of a failure to repair the wall.² And, since the corporate rights exercised by the municipality are, in England, taken to be derived either from an express grant, or from prescription, which supposes a grant, it is held that the municipal corporation which exercises a right, by prescription, is bound to the correlative duty. Thus where it was alleged that a corporation had, from time immemorial, been used to repair a way, this was held by Lord Mansfield to be equivalent to an allegation that the corporation was bound by prescription to repair the way, and that this might be the very condition of its creation or charter.³

but the streets and highway of said city shall be kept in repair by said city." The court construed this statute as intending to make the direct immunity granted by the first clause a consideration for the obligation to keep the streets and highways in repair.

¹ *Taggart v. Fall River*, 170 Mass. 325.

² *Mayor of Lyme Regis v. Henley*, 3 B. & Ad. 77, 1 Bing. N. C. 222.

³ *Mayor of Lynn v. Turner*, Cowper, 87.

(c) *Of Municipal Corporations existing under Special Charters.*

§ 60. **Semble, Liability not created by Incorporation merely.** — The rule sanctioned by the earlier American authorities is that an act of incorporation by the legislature, changing a *quasi* municipal corporation into a city, does not of itself create new civil remedies, as against the municipality, for neglect of corporate duty; so that a city, like a town or county, cannot be made liable to an action for a personal injury resulting from the neglect of duty unless the right of action be expressly given by the statute,¹ or unless the exercise of the corporate right be attended with some direct and

¹ *Edgerly v. Concord*, 62 N. H. 8; *Clark v. Manchester*, 61 N. H. 577; *Morgan v. Hallowell*, 57 Maine, 375; *Brady v. Lowell*, 3 Cush. 121; *Harwood v. Lowell*, 4 Cush. 310; *Hixon v. Lowell*, 13 Gray, 59; *Oliver v. Worcester*, 102 Mass. 489; *Hill v. Boston*, 122 Mass. 344; *Jones v. New Haven*, 34 Conn. 1, as explained 37 Conn. 475; *Hewison v. New Haven*, 34 Conn. 136; *Pray v. Mayor of Jersey City*, 32 N. J. L. 394; *Detroit v. Blackeby*, 21 Mich. 84; *Hoffman v. San Joaquin County*, 21 Cal. 426; *Winbigler v. Los Angeles*, 45 Cal. 36; *Chope v. Eureka*, 78 Cal. 588; *Arnold v. San Jose*, 81 Cal. 618; *Richmond v. Long*, 17 Gratt. 375; *Arkadelphia v. Windham*, 4 S. W. Rep. 450 (Ark. 1887); *Fort Smith v. York*, 12 S. W. Rep. 157 (Ark. 1889). It is now provided by statute, in most of the States, that all municipal corporations shall be liable for injuries resulting from the failure to keep their streets, roads, or ways in a reasonably safe and proper condition for travel. See § 167, *post*. In order to create the statutory liability, it is sufficient that this be imposed by a general law, and it is not necessary that the charter of the municipality should impose such a duty. *Campbell v. Kalamazoo*, 80 Mich. 655. It has been held that the lack of funds, and of the power to enforce contributions of labor to repair streets, would exempt a municipality from liability for injuries resulting from defects therein, although the mere fact that all the money raised for street purposes had been expended on certain streets, leaving others unsafe, would not remove the liability for injuries caused by reason of the defective condition of the neglected streets. *Whitefield v. Meridian*, 6 So. Rep. 244 (Miss. 1889), and see *Shelby v. Claggett*, 22 N. E. Rep. 407 (Ohio, 1889), but this obviously seems to be an unsound rule. See *Campbell v. Kalamazoo*, *supra*. So there is no distinction between cases arising under charters which make it the duty of the city, as such, to keep the streets in repair, and those which make this the duty of the city council. *Chope v. Eureka*, 78 Cal. 588; *Arnold v. San Jose*, 81 Cal. 618.

special emolument or advantage to the municipality.¹ In other words, the grant of general corporate powers, without more, does not create a contract as between the sovereignty and the municipality, but is a delegation of sovereignty to be exercised by the municipality under its charter, which is always subject to be amended at the pleasure of the legislature.² In this view of the law, incorporated cities are said to be mere governmental instruments for purposes of internal administration like counties, when these are created by law for the same purpose.³

¹ See § 58, *ante*.

² *Detroit v. Blackeby*, 21 Mich. 84. In this case, Campbell, J., said : "It is competent for the Legislature to give towns and counties powers as large as those granted to cities. . . . It would be contrary to every principle of fairness to give special privileges to any part of the people and deny them to others ; and such is not the purpose of city charters. In England the burgesses of boroughs and cities had very important and valuable privileges of an exclusive nature, and not common to all the people of the realm. The charters were grant of privileges and not mere government agencies. Their free customs and liberties were put by the Great Charter under the same immunity with private freeholds. [See § 59, *ante*.] But in . . . this country . . . they are not placed beyond legislative control. The Dartmouth College case, which first established charters as contracts, distinguished between public and private corporations, and there is no respectable authority to be found . . . which holds that either offices or municipal charters involve any rights of property whatever."

³ *Winbiger v. Los Angeles*, 45 Cal. 36. So in California under the Acts organizing counties, certain boards are charged with the duty of keeping highways in repair ; and it is held that the counties are not liable for personal injuries sustained by private individual through the neglect of the officers charged with this duty. *Hoffman v. San Joaquin County*, 21 Cal. 426. In the same State it was held that a municipal corporation, in the absence of statutory provision, was not liable for injuries received by falling into a sewer which was in process of construction, but was negligently left unguarded by the officers of the corporation. *Chope v. Eureka*, 78 Cal. 588, Beatty, J., dissenting. See *Arnold v. San Jose*, 81 Cal. 618. In Virginia, the converse of the rule is thus stated in an action involving injury to property : "The principle of exemption from liability for the defaults of its officers is not extended to municipal corporations where the authority, though for the accomplishment of objects of a public nature, is one from the exercise of which the corporation derives a profit, or where the duty may be presumed to be enjoined upon the corporation in consideration of privileges granted. *Sawyer v. Corse*, 17 Gratt. 230. So in *Richmond v. Long*, 17 Gratt. 375, it was held that the plaintiff in

§ 61. **Contrary Rule in New York.** — In New York, however, the later cases hold that the granting of a municipal charter is not a delegation, but a surrender of a portion of the sovereignty of the State, in consideration of which the corporation is bound by an implied undertaking to perform with fidelity the duties which the charter imposes, and that if one be injured in his person or property by the failure of the corporation to perform such a duty, he may have his action, though this be not provided for by the statute. And it is said, in a leading case, that where a public body is clothed by statute with power to do an act which the public interest requires to be done, and the means for the performance of the act are placed at its disposal, the execution of the power may be insisted on as a duty, although the statute conferring it be only permissive in its terms.¹ The general rule for the same reasons is applied not only to cities but to incorporated villages charged by the terms of their charters with the duty of repairing highways.² And the corporation is liable alike for misfeasance and non-feasance; as for permitting a hole to be left in constructing a sidewalk,³ or for the negligent construction of a building,⁴ or for a failure properly to light and place guards around an excavation made in a public street.⁵

§ 62. **In other States.** — The rule of the New York courts upon this subject is adopted in Texas.⁶ So, in Colorado, it is held that cities and towns incorporated under the general law,⁷

error was not responsible for the loss of a slave admitted into its hospital on the ground of the negligence of its agents at the hospital.

¹ *Hutson v. Mayor of New York*, 5 Sandf. 289 (1851), Sandford, J., dissenting; affirmed 9 N. Y. 163, Taggart, J., dissenting. See also *Weet v. Brockport*, 16 N. Y. 161 n.; *Davenport v. Ruckman*, 37 N. Y. 568; *Requa v. Rochester*, 45 N. Y. 129; *Kunz v. Troy*, 104 N. Y. 344.

² *Hickok v. Plattsburg*, 15 Barb. 427, 16 N. Y. 161 n.; *Conrad v. Ithaca*, 16 N. Y. 158; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459.

³ *Weet v. Brockport*, 16 N. Y. 161 n.

⁴ *Conrad v. Ithaca*, 16 N. Y. 158.

⁵ *Storrs v. Utica*, 17 N. Y. 104.

⁶ *Klein v. Dallas*, 71 Tex. 280; *Bauguss v. Atlanta*, 74 Tex. 629; *Sherman v. Williams*, 77 Tex. 310.

⁷ Gen. Sts. c. 109, p. 593.

having exclusive control of their streets, are liable for damages caused by a failure to repair, whether such liability is specifically imposed by the statute or not.¹ Under the Oregon statute providing that an action may be maintained against a public corporation "for an injury to the rights of the plaintiff arising from some act or omission" of such corporation, a city is held to be liable for an injury caused by the neglect of its officers to repair streets which it is their duty to maintain, unless the charter, in terms, exempts the city from such liability.² In Louisiana, it is held that, in the absence of an express statute imposing the duty and declaring the liability, municipal corporations, having the powers ordinarily conferred upon them respecting bridges, streets, and sidewalks within their limits, owe to the public the duty to keep these in a safe condition for use in the usual mode, by travellers; and are liable in a civil action for injuries resulting from the failure to perform this duty.³ A similar view of the law obtains in Illinois, it being held in that State that "a municipality by voluntarily accepting a charter, impliedly contracts . . . to perform all the duties imposed on them, and they are made of perfect obligation by being clothed with all the power and authority necessary to their full performance, and, in this respect, there is no difference between such a corporation and a private corporation, or individual, who had received from the sovereign power a valuable grant charged with conditions."⁴ In Pennsylvania, and, it seems, in Maryland, towns and counties are held liable in private actions for injuries, at common law,⁵ and so cities are held affected with a similar liability.⁶

¹ *Boulder v. Niles*, 9 Col. 415.

² *Sheridan v. Salem*, 14 Or. 328; *Farquar v. Roseburg*, 18 Or. 271.

³ *Cline v. Crescent City R. R.*, 41 La. Ann. 1031.

⁴ *Browning v. Springfield*, 17 Ill. 143, and see *Clayburg v. Chicago*, 25 Ill. 535; *Pekin v. Newell*, 26 Ill. 320; *Joliet v. Verley*, 35 Ill. 58; *Bloomington v. Bay*, 42 Ill. 503; *Springfield v. Le Claire*, 46 Ill. 476; *Mechanicburg v. Meredith*, 54 Ill. 84; *Peru v. French*, 55 Ill. 317; *Waltham v. Kemper*, 55 Ill. 346; *White v. Bond*, 58 Ill. 297; *Centralia v. Scott*, 59 Ill. 129; *Sterling v. Thomas*, 60 Ill. 264; *Galesburg v. Higley*, 61 Ill. 287.

⁵ See cases cited § 53 *n.*, *ante*.

⁶ *Pittsburg v. Grier*, 22 Penn. St. 54; *Erie v. Schwingle*, 22 Penn. St.

§ 63. In the Supreme Court of the United States. — In the Supreme Court of the United States, the implication from the earlier cases would seem to be that private actions, whether against *quasi* corporations, as towns or counties, or against incorporated municipalities, for defects in highways, could not be maintained unless under the explicit authority of the statute.¹ Later, a defendant municipality was held liable for an injury suffered by reason of a defect in a bridge, on the ground that the burden of repairing or rebuilding the bridge was imposed upon the defendants in consideration of the privileges and immunities conferred by the charter.² In a 384; *Anne Arundel Commissioners v. Duckett*, 20 Md. 468. Where a local statute provided that taxpayers might make and repair footwalks, and that the road supervisors might deduct the cost thereof from the taxpayers' road-tax, it was held that a person injured by a defect in a plank road-walk had no remedy for his injury, as against the township. *Char-tiers v. Langdon*, 114 Penn. St. 541.

¹ *Fowle v. Alexandria*, 3 Pet. 398, 400; *Providence v. Clapp*, 17 How. 161, 167. In *Fowle v. Alexandria*, the question at issue was whether a municipal corporation established by special charter for the general purposes of government, with limited legislative powers, was liable for losses consequent on its having misconstrued the extent of its powers in granting a license which it had no authority to grant, without taking that security for the conduct of the person obtaining the license which its own ordinance had been supposed to require, and which might protect those who transacted business with the person acting under the license. The court, by Marshall, C. J., said: "We find no case in which this principle has been affirmed. That corporations are bound by their contracts is admitted; that money corporations, or those carrying on business for themselves, are liable for torts is well settled; but that a legislative corporation established as a part of the government of the country, is liable for losses sustained by a non-feasance, by an omission of the corporate body to observe a law of its own in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case." In *Providence v. Clapp*, 17 How. 161, the action arose under a statute of Rhode Island which made towns and cities liable for any neglect to keep highways in repair, to all persons injured thereby. The court, by Nelson, J., said: "It is admitted that the defendants are not liable for the injury complained of at common law, but that the plaintiff must bring the case within the . . . statute to sustain the action."

² *Weightman v. Washington*, 1 Black, 39. In this case Clifford, J., said: "It is . . . clear that the bridge is placed under the sole control and management of the defendants; and, in view of the several provisions

still more recent case, a majority of the Supreme Court held that the District of Columbia was liable to a traveller for an injury caused by a defect in a street, which defect was the result of the negligent and improper construction of a public work which the corporation had authorized. While the court adverted to a distinction sometimes taken, which would relieve the corporation from liability in cases of mere *non-feasance*, and charge it with responsibility for *misfeasance* like that charged in the case under consideration, the tenor of the opinion renders it apparent that the court intended to adopt to its full extent the rule of the New York cases upon this subject. The majority of the court assumed (1) that a municipal corporation, in the exercise of all its duties, is but a department of the State; (2) that a corporation can act only by its agents or servants; (3) that the care and superintendence of streets are peculiarly municipal duties; and (4) that the weight of authority had established the doctrine that a city is liable to an individual for an injury

of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants, in consideration of the privileges and immunities conferred by the charter. Most ample means, also, are placed at the disposal of the defendants . . . to enable them to perform the duty enjoined, . . . as the defendants have very large power to lay and collect taxes on almost every description of property, real and personal, as well as on stock and bonds and mortgages; and they also derive means for the use of the city from granting licenses, and from the rents and profits of real estate which they own and hold." In *Nebraska City v. Campbell*, 2 Black, 590, the rule in *Weightman v. Washington* was reaffirmed upon a similar state of facts. In *Robbins v. Chicago*, 4 Wall. 657, the action was founded upon a statute of Illinois providing a remedy against the town or city in behalf of persons injured by a defect in a way, so that the expressions in the opinion implying the existence of a common-law remedy were not necessary to the decision of the case. And this is true as to certain expressions contained in *Rock Island Supervisors v. United States*, 4 Wall. 435. In *Mayor of New York v. Sheffield*, 4 Wall. 189, being in error to the Circuit Court for the southern district of New York, the plaintiff in error did not make any question as the existence of a common-law liability as against the municipality. In *Saint Paul Water Co. v. Ware*, 83 U. S. 566, it was said that a city might be liable for a defect in a highway caused by the neglect of the employee of a water company which had contracted with the city to lay water pipes. See § 57.

arising from negligence in the construction of a work authorized by the city. And it was held that the Board of Public Works of the District of Columbia¹ was a part of and an agency of the municipal corporation, and that the proceedings of that Board in the repair and improvement of the street were the proceedings of the corporation, and that, therefore, the corporation was responsible. Hunt, J., said: "A distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. . . . The latter are auxiliaries of the State merely, and, when corporations, are of the lowest grade, and invested with the smallest amount of power."² It will be observed, while the rule in the courts of New York and Illinois rests upon the doctrine that the liability of the municipality arises out of a contract created by the act of incorporation between it and the sovereignty represented by the legislature, that the Supreme Court of the United States does not affirm this doctrine, but, on the other hand, holds that a municipal corporation is a department of the State, and admits that *quasi* municipal corporations, as being auxiliaries of the State, act solely by virtue of delegated powers. The court seems to accept the rule of the later New York cases as being too firmly settled to be open to discussion, and cites, in support

¹ The District of Columbia is a municipal corporation, with power to contract, to have a seal, sue and be sued, and to exercise the other powers of a municipal corporation. The statute provides that "the Board of Public Works shall have entire control of, and make all regulations which they shall deem necessary for keeping in repair the streets . . . of the city, and all other works which may be intrusted to their charge. . . . They shall disburse . . . all moneys appropriated . . . or collected from property holders, . . . for the improvement of streets, . . . and shall assess, . . . upon the property adjoining, and to be specially benefited by the improvements, . . . a reasonable proportion of the cost." U. S. St. Feb. 21, 1871, § 57.

² *Barnes v. District of Columbia*, 91 U. S. 440; opinion by Hunt, J., Waite, C. J., Clifford, Miller, and Davis, JJ., concurring, and Swayne, Field, Strong, and Bradley, JJ., dissenting.

of the rule, a number of cases, which have been cited and commented on in preceding paragraphs.¹

¹ In his dissenting opinion in *Detroit v. Blackeby*, 21 Mich. 84, Cooley, J., seems to rest his approval of the New York rule chiefly upon considerations of public policy, and relies much, in support of his opinion, upon the English cases, *Mayor of Lynn v. Turner*, Cowper, 87, and *Mayor of Lyme Regis v. Henley*, 3 B. & Ad. 77, 11 Bing. (N. C.) 222, — cases, however, in which it appeared that the corporation under the terms of its charter exercised certain franchises to its own direct pecuniary emolument, or that a condition was to be presumed in the grant of the franchises. See § 59, *ante*, and where the American cases cited by Cooley, J., in *Detroit v. Blackeby*, will be found commented upon. In an elaborate discussion of the subject by Gray, C. J., now an associate justice of the Supreme Court of the United States, in the case of *Hill v. Boston*, 122 Mass. 344, the cases cited by the court in *Barnes v. District of Columbia*, are examined with great minuteness, and the following conclusions are reached: (1) There is no American case in which the neglect of a duty imposed by a general law upon cities and towns alike has been held to sustain an action by a person injured thereby against a city when it could not be sustained against a town. (2) The only decisions of the State courts in which the mere grant by the legislature of a city charter, authorizing and requiring the city to perform certain duties, has been held sufficient to render the city liable for neglect of such duties, when a town would not be so liable, are in New York since 1850, see cases cited *supra*, § 62, and in Illinois, see *Browning v. Springfield*, 17 Ill. 143; *Springfield v. Le Claire*, 49 Ill. 476; *Clayburg v. Chicago*, 25 Ill. 535; *Pekin v. Newell*, 26 Ill. 320. (3) The cases in the Supreme Court of the United States in which private actions have been sustained against a city for neglect of a duty imposed by law are of two classes: 1, Those which arose under the peculiar terms of special charters, *Weightman v. Washington*, 1 Black, 39; *Barnes v. District of Columbia*, *supra*, or in a territory of the United States; *Nebraska City v. Campbell*, 2 Black, 390; 2, Those in which the general liability of the defendant municipality was not denied or discussed, *Mayor of New York v. Sheffield*, 4 Wall. 189; *Robbins v. Chicago*, 4 Wall. 657. (4) The result of an examination of the English authorities is, that when a duty is imposed upon a municipal corporation for the benefit of the public, without any consideration or emolument received by the corporation, it is only where the duty is a new one, and such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect in its performance is to be presumed. See cases cited § 58.

SECTION VI.

OF THE LIABILITY OF OWNERS AND OCCUPANTS OF LAND, ETC.

§ 64. **Generally.** — In considering the duty of the owner or occupant of land or buildings towards strangers entering the premises, it will be found that the defendant owner or occupant will be held to a more or less stringent duty according as he is more or less responsible for the act of the plaintiff in so entering. It is sometimes said that, in certain cases, the owner will be liable for slight, and in other cases only for gross negligence, but the better opinion is that the law does not recognize the existence of degrees of negligence;¹ and a better statement of the rule of law governing the cases is that that which may be negligence in one case, for example, as to one entering the premises on business by the procurement of the owner, may not be negligence under other circumstances, as towards a trespasser, or one entering for an unlawful purpose. The measure of the owner's duty is to be considered (1) as to persons entering the premises on lawful business, or by the procurement of the owner or occupant; (2) as to trespassers or intruders; and (3) as to persons entering as licensees.

§ 65. **Questions of Law and Fact.** — The question whether the injured person entered the premises by the procurement or invitation of the defendant, or as a licensee, or as a trespasser or intruder, will, if the testimony is contradictory or doubtful, be for the determination of the jury.² But when the uncontroverted testimony, in any case, shows clearly what was the relation between the plaintiff and the occupant or owner, the court may, as matter of law, hold that the plaintiff, being a licensee or trespasser, is debarred from a recovery. Thus where a person, without business or permission, but

¹ See § 92, *post*, notes, and cases cited.

² *Indemaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311; *Stewart v. Harvard College*, 12 Allen, 58; *Gilbert v. Nagle*, 118 Mass. 278; *Hanks v. Boston & Albany R. R.*, 147 Mass. 495.

merely to gratify his curiosity, went on board a vessel and was injured by falling down an open and unguarded hatchway, he was held to be a trespasser.¹ But if the person enters the vessel, although on a day when it is not open to the public, by permission, he is a licensee.² So if one without excuse enters upon a railway track, and is there injured by a passing train, he will be held to be a trespasser and so to be debarred from recovering for his injuries, unless these were maliciously or wantonly inflicted upon him by the servants of the railroad.³ But when it is a fair question whether the plaintiff did not use the track by the invitation of the servants of the railroad, as where a passenger just alighted from a train was crossing the track to the highway when he was injured, the question is for the determination of the jury.⁴ A person who visits a building for a purpose not connected with the use for which the building is fitted, or to which it is put, — as to make an inquiry of interest to himself alone, — cannot be taken to have entered the building by invitation.⁵

(a) *As to Persons entering on Business, or by the Procurement of the Owner or Occupant.*

§ 66. **Owner responsible for Condition of the Premises. Implied Invitation.** — If a person enters upon premises on business to be transacted with the owner or occupant thereof, or by the procurement of the owner or occupant; and being himself in the exercise of due care, is injured by reason of the unsafe condition of the premises or the approaches thereto, such unsafe condition being known, or such as ought to have been

¹ *Severy v. Nickerson*, 120 Mass. 306.

² *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66.

³ *Johnson v. Boston & Maine R. R.*, 125 Mass. 75; *Morrissey v. Eastern R. R.*, 126 Mass. 377; *Philadelphia & Reading R. R. v. Hummell*, 44 Penn. St. 465, and see cases cited § 73, *post*.

⁴ *Gaynor v. Old Colony & Newport R. R.*, 100 Mass. 208.

⁵ *Plummer v. Dill*, 156 Mass. 426. So it was held that one who entered a building consisting of several tenements having a common access and leased to several tenants, for the purpose of attending a wake being held in one of the tenements, not having any express invitation to attend the wake, was, as to the owner of the building, a licensee, merely. *Hart v. Cole*, 156 Mass. 475.

known, to the owner or occupant, the latter will be answerable in damages for such injuries. And the American courts hold, generally, that if the owner or occupant of land induces another to enter or pass over his premises, he thereby assumes the obligation that the premises are safe and suitable for such use.¹ The owner cannot, generally, avoid his responsibility, by delegating it, so long as he retains an efficient control of the premises. Thus, if the owner of premises under his own control employs an independent contractor to do work upon them, which from its nature is likely to render the premises dangerous to persons who may come upon them by the owner's invitation, the owner is not, by reason of the contract, relieved from the obligation of seeing that due care is used to protect such persons.² The rule applies although the premises are leased, if the lessor retains an efficient control over them,³ and where the employer retains the right of access to the premises, the law may require him to see that due care is used to prevent harm, whatever the nature of the contract with those whom he employs.⁴ Although a mere passive acquiescence by the owner or occupant in a certain use of his land by another can amount to no more than a license as in favor of the person so using the land, yet if the owner or occupant does acts which amount to an implied invitation to

¹ *Bennett v. Louisville & Nashville R. R.*, 102 U. S. 580; *Samuelson v. Cleveland Iron Mining Co.*, 49 Mich. 164; *McCone v. Michigan Central R. R.*, 51 Mich. 601; *Powers v. Harlow*, 53 Mich. 507; *Donaldson v. Wilson*, 60 Mich. 86; *Sweeney v. Old Colony & Newport R. R.*, 10 Allen, 368; *Elliot v. Pray*, 10 Allen, 378; *Coughty v. Woolen Co.*, 56 N. Y. 124; *Flynn v. Central R. R. of N. J.*, 142 N. Y. 439; *Latham v. Roach*, 72 Ill. 179; *Gillis v. Pennsylvania R. R.*, 59 Penn. St. 129; *Malone v. Hawley*, 46 Cal. 409; *Deford v. Keyser*, 30 Md. 179.

² *Curtis v. Kiley*, 153 Mass. 123; *Southern Ohio R. R. v. Morey*, 47 Ohio St. 207.

³ See §§ 85, 90, *post*.

⁴ *Woodman v. Metropolitan R. R.*, 149 Mass. 335, 340. See *Bower v. Peate*, L. R. 1 Q. B. D. 321, approved in *Dalton v. Angus*, L. R. 6 App. Cas. 740; *Angus v. Dalton*, L. R. 4 Q. B. D. 162, and L. R. 3 Q. B. D. 85; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Hole v. Sittingbourne & Sheerness Railway*, 6 H. & N. 488, 500; *Circleville v. Neuding*, 41 Ohio St. 465; *McCafferty v. Spuyten Devil & P. M. R. R.*, 61 N. Y. 178, 185 §§ 192 *et seq.*, *post*.

use the land, his liability will be the same as if he had held forth an express invitation.¹ The duty imposed by law upon the master to furnish a safe place in which his servants may work, is a branch of the general duty imposed on him as owner of the premises for the protection of all persons lawfully entering upon them.²

§ 67. **Applications of the Rule.**— If a person allows a dangerous place to be opened, or to remain open for an unreasonable time, upon land belonging to him or within his control, and fails to give notice of the danger to persons entering upon the land by his invitation, express or implied, he will be responsible to such persons for any injury occurring to such persons by reason of his failure of duty.³ It is negligence to maintain an open hatchway in the sidewalk,⁴ or to throw down a bale of goods without warning into a private passage-way through which the plaintiff has a right to pass.⁵ So if the owner of land, who maintains a private road for the use of persons coming to his house, permits a builder engaged in building a house on the land to place materials therefor on the road, and the plaintiff, while proceeding on the road to the owner's house, runs against the materials and is injured, the owner may be liable.⁶ If the owner permits a pitfall to exist in a

¹ *Corby v. Hill*, 4 C. B. (N. S.) 556; *Chapman v. Rothwell*, El. Bl. & El. 168; *Hounsell v. Smyth*, 7 C. B. (N. S.) 738; *Sweeney v. Old Colony & Newport R. R.*, 10 Allen, 368. One who maintains a bridge connecting buildings occupied by him on opposite sides of a railway track, is liable to a brakeman, injured while performing his duty by coming in contact with it, although the railroad company consented to the construction of the bridge, — it having notified the defendant, before the accident, that the bridge was dangerous and must be removed. *Dukes v. Eastern Distilling Co.*, 51 Hun, 605. A letter-carrier who enters a building leased for business purposes to many different tenants, and provided with boxes for the reception of letters, for the purpose of delivering letters, may be considered as entering the building by the implied invitation of the owner. *Gordon v. Cummings*, 152 Mass. 513.

² *Musick v. Dold Packing Co.*, 58 Mo. App. 322.

³ *Oliver v. Worcester*, 102 Mass. 489.

⁴ *Engel v. Smith*, 82 Mich. 1.

⁵ *O'Callaghan v. Bode*, 84 Cal. 489, and see *Dehring v. Comstock*, 78 Mich. 153.

⁶ *Corby v. Hill*, 4 C. B. (N. S.) 556. Where the plaintiff fell into a

private way belonging to him, he is answerable for any injury thereby caused to one lawfully and carefully using such way,¹ and so if he permits a trap-door to remain open in a passage-way,² or in his store, so that a customer falls into it.³ It is held that if the owner of a lot in a city has for a long time permitted the public to cross his land by a certain path, it is his duty, on making an excavation in the path for building purposes, to place a guard around it, or properly to warn the

hole, used for the defendant's convenience and ordinarily guarded by a trap, but at the time of the accident left open and unguarded, it was held that since the hole was in the nature of a nuisance maintained by the defendant, it was not necessary for the plaintiff, in order to a recovery, to prove affirmatively that the act of a stranger in opening the trap did not contribute to the injury. *Barry v. Terkildsen*, 72 Cal. 254. Where a defendant had owned the land in which was a dangerous pitfall only about four months, it was held that he might show, upon the issue of negligence, that the nature of the soil about the pitfall was such that it was practically almost impossible to fence it. *Overholt v. Vieths*, 93 Mo. 422. While making purchases in the defendant's store, the plaintiff, going from a light to a lower and dark apartment to which she had been directed, endeavored to reach a balustrade on the stairway, but was prevented from so doing by display figures which the defendant had placed on the stairs, and fell and was injured. It was held that the defendant was guilty of negligence. *Larken v. O'Neill*, 48 Hun, 591. An invitation to the public to enter the yard of a tenement-house, if this is to be implied from the aspect of the house and grounds, does not extend to all parts of the yard, irrespective of pathways or necessary lines of travel; and a licensee cannot recover for an injury caused by his falling at night into a cellar-way negligently left unguarded, where it does not appear that the route chosen by him across the yard was specially appropriated to travel. *Walker v. Winstanley*, 155 Mass. 301. The case was distinguished from *Curtis v. Kiley*, 153 Mass. 123, see § 66, *ante*, in that, in the latter case, it was taken to be proved that there was a passage-way across the yard. It was held that a person who went upon the land of another, without invitation, to secure employment from the owner of the land, was not entitled to damages for an injury received from a defective machine on the premises not obviously dangerous, which he passed in the course of his journey; and that although the owner could have ascertained the defect by the exercise of reasonable care, yet that he owed no legal duty to a stranger, so coming upon the premises, to keep the machinery in repair. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391.

¹ *Toomey v. Sanborn*, 146 Mass. 28; *Foren v. Rodick*, 90 Maine, 276.

² *Chapman v. Rothwell*, El. Bl. & El. 108.

³ *Freer v. Cameron*, 4 Rich. 288.

public of its existence ;¹ for, in such a case, it is to be assumed that the public user is by the implied invitation of the owner,² and there might be cases in which the circumstances would be such as to lead the persons using it to suppose that it was a public highway.³ Thus if a person lays out and paves a sidewalk on his own land abutting on a public street, and allows it to remain apparently as a part of the street, he thereby extends an invitation to the public to use it as such, and is bound to use reasonable care to keep it safe for foot-passengers.⁴ So where a private person, or corporation, as a turnpike company, maintains a way upon which the public may travel for hire, as by the payment of a toll, such person or corporation is bound to keep such road in reasonable repair ; and for any failure of duty in this respect, by reason of which a traveller lawfully using the way suffers injury, the owner of the way is responsible, whether having actual knowledge of the existence of the defect or not.⁵ The rule applies to persons or corporations maintaining pleasure grounds to which persons are admitted. Thus an agricultural society is liable to a person lawfully attending its public exhibition for injuries received by reason of its grounds not being reasonably safe. And where such a person, walking along, was struck by a third

¹ *Graves v. Thomas*, 95 Ind. 361.

² *Campbell v. Boyd*, 88 N. C. 129 ; *Barry v. New York Central & H. R. R. R.*, 92 N. Y. 289, and see *Byrne v. New York Central & H. R. R. R.*, 104 N. Y. 362.

³ *Binks v. South Yorkshire Railway*, 32 L. J. (N. S.) Q. B. 26. To the general principle, see *Hoffman v. New York Central & H. R. R. R.*, 87 N. Y. 25 ; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577 ; *Houston & T. C. R. R. v. Symkins*, 54 Tex. 615 ; *Mulholland v. Brownrigg*, 2 Hawks. 349 ; *Griffiths v. London & N. W. Railway*, 14 L. T. Rep. 797 ; *Gallagher v. Humphrey*, 6 L. T. (N. S.) 684.

⁴ *Holmes v. Drew*, 151 Mass. 578. See *Stevens v. Nichols*, 155 Mass. 472, 475 ; *Lorenzo v. Wirth*, 170 Mass. 496. Where a person built a walk leading from the public street to an opera-house owned by him, and thence to another street, and permitted the public to use it, it was held that he was bound to keep it in a reasonably safe condition for travel. *Breeze v. Powers*, 80 Mich. 172.

⁵ See *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 ; *Baltimore v. Baltimore & Ohio R. R.*, 21 Md. 51 ; *Miller v. Canal Commissioners*, 21 Penn. St. 23.

person swinging a mallet to hit a striking machine situated on the grounds without a guard around it, it was held that the question of the defendant's negligence was for the jury.¹ A street railway company which advertises a balloon ascension at a park owned by it, thereby invites the public to visit the premises and witness the ascension, and is liable for injuries suffered by a visitor resulting from a fall of apparatus used in the ascension, and it is immaterial that the person making the ascent is an independent contractor.²

§ 68. *Same Subject: Vessels.* — It is the duty of the owners of passenger vessels to see that these are kept reasonably safe for travellers, and if there is a failure in this duty the owner is liable.³ And if the owner of a vessel holds out an inducement to a person to enter a vessel which is in a dangerous condition, he may be liable for resulting injuries.⁴ And this duty subsists as to the approaches and entrances to vessels waiting, in berth, for passengers.⁵ Where ships were received into a dock for repairs, and provided with stages for the necessary work by the dock owner, it was held that the workmen who came to the ships for the purpose of repairing them, whether in privity with the dock owner or not, were there for business in which the dock owner was interested, and were to be considered as invited by him to use the dock and all the appliances provided by him as incident to such use, so that the dock owner was bound to use reasonable care to see that such stages and appliances should be safe.⁶

¹ *Selinas v. Vermont State Agricultural Soc.*, 60 Vt. 249.

² *Richmond & Manchester R. R. v. Moore*, 94 Va. 493, and see *Thompson v. Lowell, Lawrence, & H. St. Railway*, 170 Mass. 577; *Southern Ohio R. R. v. Morey*, 47 Ohio St. 407.

³ See § 46, *ante*, and cases cited.

⁴ *The Joseph Stickney*, 31 Fed. Rep. 156. See *Severy v. Nickerson*, 120 Mass. 306; *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66. It is not negligence for the owner of a boat laid up in winter quarters to leave her hatches off without protection against persons entering the boat without authority and falling into them. *Caniff v. Blanchard Navigation Co.*, 66 Mich. 638. See *Anderson v. Scully*, 31 Fed. Rep. 161.

⁵ *Race v. Union Ferry Co.*, 138 N. Y. 644.

⁶ *Heaven v. Pender*, 11 Q. B. D. 503, distinguishing *Blackmore v. Exeter Railway*, 8 El. & Bl. 1035. So a coal merchant customarily

§ 69. **Same Subject: Railroad Crossings.**—If a railroad makes a private crossing over its track at grade, and permits the public to use it, and stations a flagman to prevent travelers from crossing when there is danger, it will be taken to invite the public so to cross, and will be liable for the negligence of the flagman in performing his duty.¹ And if the company has for a long time permitted the public to cross over its road at a certain point without objection or hindrance, an invitation to cross may be implied, and the road will be bound to exercise care, having regard to the probable use and proportioned to the probable danger to persons crossing the road at that point.² Further, there are cases in which it may be left to the jury to say whether there was not an implied invitation to cross a railroad, although at a point not laid out as a crossing, when the circumstances are such as to justify the inference that the plaintiff was invited and induced to cross at that place; as when a passenger, alighting from a train, was injured while crossing the track from the train to the highway, there being no guard or barrier to prevent him from so doing.³ From the constant use of the right of way of a railway company for purposes of crossing for twenty years or

furnishing tackle to his customers with which to unload coal from the barge in which it is delivered, is liable to the servant of a customer for personal injuries caused by a defect in such tackle. *Hayes v. Philadelphia & R. Coal & Iron Co.*, 150 Mass. 457.

¹ *Sweeney v. Old Colony & Newport R. R.*, 10 Allen, 368.

² *Harriman v. Pittsburg, C. & St. L. Railway*, 45 Ohio St. 11; *Isabel v. Hannibal & St. Jo. R. R.*, 60 Mo. 475; *Baltimore & Ohio R. R. v. State*, 50 Md. 542; *Sutton v. New York Central & H. R. R.*, 66 N. Y. 244; *Clampit v. Chic., St. P. & K. C. R. R.*, 84 Iowa, 71.

³ *Gaynor v. Old Colony & Newport R. R.*, 100 Mass. 208; *Robbins v. Fitchburg R. R.*, 161 Mass. 145; *Conaty v. New York, N. H. & H. R. R.*, 164 Mass. 572; *Tilton v. Boston & A. R. R.*, 169 Mass. 253. The shortest route from a village to its railway station was by a path leading across a switch. The railway company customarily parted its cars on this switch so as to leave a space between them for a passage. A person crossing the track when the space so left was but eighteen inches was caught and killed by the sudden backing of the train. It was held that the company by its acts had held out an implied invitation to the public to use the crossing, and so was responsible for the injury, the deceased having been in the exercise of due care. *Nichols v. Washington, O. & W. R. R.*, 83 Va. 99, *Fauntleroy, J.*, dissenting.

more, without objection, an implied invitation on the part of the company may be inferred;¹ and where the company had maintained a private crossing for more than twenty years, during which time the public had used it openly and continuously, it was held that the crossing was a highway by prescription.² Generally, railroads are liable for their neglect properly to maintain their crossings over public highways,³ and this whether or not their duties in this regard are regulated by statute. They are bound to keep safe the sidewalks at crossings,⁴ and also bridges, with their abutments and railings, which they have lawfully constructed in order to lead a highway over their tracks; and this duty extends to keeping the way safe to the lines of the excavation made in constructing the railroad.⁵ Where a crossing is protected by gates, it is said that although the principal purpose of these is effectually to warn travellers against crossing, while they are closed, yet there may be places in which the gate should be a strong barrier sufficient to help to keep horses off the tracks.⁶

§ 70. **As to Persons entering by Invitation merely.**—It is apprehended that the responsibility of the owner or occupant of land or buildings is the same towards persons entering the premises, whether these come upon business to be transacted with the owner or occupant, or at his solicitation, or upon his mere invitation; since, in any of these cases, the entry is by his procurement or inducement, and not by his mere acqui-

¹ *Davis v. Chicago & N. W. R. R.*, 58 Wis. 646. But where a railway company permits an abuttor on its roadway to maintain a crossing over its track for the sole convenience of such abuttor and persons doing business with him, and there is no public or notorious user of such crossing, the railway company will not be liable to a third party injured while attempting to use such crossing, as having held out to the plaintiff an invitation to cross. *Donnelly v. Boston & Maine R. R.*, 151 Mass. 210.

² *Johanson v. Boston & Maine R. R.*, 153 Mass. 58. See *Chenery v. Fitchburg R. R.*, 166 Mass. 211.

³ *Omaha & R. V. R. R. v. Ryburn*, 40 Neb. 87.

⁴ *Retan v. Lake Shore & M. S. R. R.*, 94 Mich. 146; *Jeffrey v. Detroit, &c. R. R.*, 108 Mich. 221.

⁵ *Titcomb v. Fitchburg R. R.*, 12 Allen, 254.

⁶ *Marks v. Fitchburg R. R.*, 155 Mass. 493, and see *Tyrrell v. Eastern R. R.*, 111 Mass. 546.

escence, or against his will. It has been held, in certain English cases, that one who enters upon the premises merely by the invitation of the occupant, holds, as to the latter, the relation of a licensee.¹ But it is difficult to perceive any sound reason for this distinction, since one who enters by invitation must be taken to enter by the inducement of the occupant.² So, it was held that if a religious society gives notice of a meeting to be held in its house of worship, and invites the members of other societies to attend, a member of a church so invited, while on the land of the society, is not a mere licensee, and may maintain an action against the society for a personal injury sustained by him, while in the exercise of due care, by reason of the dangerous condition of the defendant's premises.³ It would seem that the question in all cases is whether the plaintiff entered the premises with the mere consent, or at the wish of the defendant, expressed or implied. If he enter by consent merely, he is a licensee ;

¹ *Southcote v. Stanley*, 1 H. & N. 247. In this case it appeared that the defendant was the proprietor of a hotel to which he invited the plaintiff, and that upon the premises there was an insecure and dangerous door, which, with the knowledge of the defendant and not being himself negligent, the plaintiff opened and was thereby injured. It was held that the defendant was not liable for the injury, for that there was a distinction between persons coming upon the premises upon business and those coming only by invitation, the court apparently considering the latter to be licensees merely. It is apprehended that the doctrine of this case is not supported by the tenor of the American authorities. And the rule in England has been limited so as to hold that if the invitation is for convenience of both parties, as to leave the premises by a way more convenient than the usual way; *Nicholson v. Lancashire & Yorkshire Railway*, 34 L. J. (Ex.) 84; or to transact business in a different place or manner from what is usual; *Holmes v. Northeastern Railway*, L. R. 4 Exch. 254, L. R. 6 Exch. 123; then the invited person is not merely a licensee. The true rule is said to be this: "A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition." *Sweeney v. Old Colony & Newport Railroad Co.*, 10 Allen, 368; *Zoebis v. Tarbell*, 10 Allen, 385.

² See comments on the case of *Southcote v. Stanley*, by Cockburn, C. J., in *Corby v. Hill*, 4 C. B. (N. s.) 556, 565, as cited § 81, *post*, n.

³ *Davis v. Central Cong. Society*, 129 Mass. 367.

if by the defendant's wish, that is, by invitation, for whatever purpose, he is entitled to a reasonable degree of protection. It has been intimated that the general rule may be qualified when the owner of the land operates thereon such a dangerous force as electricity, upon the ground that persons using or controlling dangerous forces are bound to special care.¹ Persons entering premises on business with the owner are entitled to reasonable protection and warnings of danger after their business is completed and they remain on the premises by invitation.²

(b) *As to Persons Trespassing.*

§ 71. **General Rule : Owner liable for Wanton Injury.** — Generally, a trespasser upon the premises of another assumes all risks of danger arising out of the condition of the premises, and an act which might be negligent as to one whom the owner has invited or permitted to come upon the premises, may not be negligent as to one intruding without the consent or knowledge of the owner.³ In other words, the liability of the owner is limited, as to the trespasser, because the latter is a mere stranger to whom the owner owes no duty. Thus the owner of land is not, as to trespassers thereon, bound to fence in his land or in any way to mark the boundaries of his possession.⁴ Nor is he bound to inclose obstructions to

¹ Newark El. Light Co. v. Mason, 39 U. S. App. 416. See § 131, *post*.

² Hartman v. Muehlebach, 64 Mo. App. 565.

³ The rule will be the same, although the trespass be involuntary. Thus in an action to recover for injuries received by falling into a turn-table at night, it appeared that the plaintiff was walking along a street which passed through the railroad company's yards; that the turn-table was located therein; and that the plaintiff was well acquainted with the locality, but missed his way, and fell in. It was held that he was not entitled to recover. *Early v. Lake Shore & Mich. Southern R. R.*, 66 Mich. 349. Where one coming to the defendant's mill for goods was directed to wait at an outside door for them, but went into the mill and was injured by falling down the unguarded shaft of an elevator used only for hoisting merchandise, and was injured, it was held that he could not recover. *Trask v. Shotwell*, 41 Minn. 66.

⁴ *Stafford v. Ingersoll*, 3 Hill, 38; *Wells v. Howell*, 19 J. R. 385; *Beck v. Carter*, 68 N. Y. 283; *Gorr v. Mittlestadt*, 96 Wis. 296. This is so, although the trespasser is an infant. See cases cited § 75 n., *post*; *McVoy v. Oakes*, 91 Wis. 214; *Richard v. Connell*, 49 Neb. 467.

travel, as logs, etc., placed upon his land,¹ or excavations, unless these be so near the highway as to constitute a public nuisance.² The owner of a building in process of construction is not bound to keep it safe as to trespassers entering it.³ But the mere fact that the plaintiff receives his injury while in the act of violating the law, or of invading the rights of the defendant, will not excuse a wilful injury of the plaintiff by the defendant, or an act so recklessly negligent as to justify the presumption that the defendant was wantonly careless.⁴ For, although the owner owes no special duty to the trespasser, every member of the community owes to every other the duty of not wantonly exposing him to danger. Thus although a trespasser who is injured by falling into an excavation made or permitted to exist upon the land of another, for a lawful purpose, cannot recover damages therefor; yet the owner will be responsible if he keeps a ferocious animal upon his land, without notice, by which the trespasser is injured;⁵ for it is not lawful, without notice, wilfully to expose even a trespasser to bodily harm.⁶ So if the owner

¹ *Deane v. Clayton*, 7 Taunt. 522.

² See *Hounsell v. Smyth*, 7 C. B. (N. S.) 731, and cases cited §§ 187 *et seq.*, *post*. The circumstances which will relieve the owner from liability to a licensee will, *a fortiori*, relieve him as to a trespasser. See §§ 79 80, *post*.

³ *Castle v. Parker*, 18 L. T. (N. S.) 367; *Roulston v. Clark*, 3 E. D. Smith. 366; *Campbell v. Lunsford*, 83 Ala. 512; *Lake Shore & M. S. R. R. v. Bodemer*, 139 Ill. 596; *McVoy v. Oakes*, 91 Wis. 214.

⁴ "For his wrong or trespass the trespasser is answerable in damages, and he may be punishable for his violation of law; but his rights as to other persons and as to other transactions are not affected by that circumstance. A traveller may be riding with a horse and carriage which he had no right to take or use; he may be travelling on a turnpike without payment of toll, . . . upon what is called the wrong side of the road, . . . and in none of these cases is his right of action for any injury he may sustain from the negligent conduct of another in any way affected by these circumstances." Per Bell, J., in *Norris v. Litchfield*, 30 N. H. 271, 277. See *Spofford v. Harlow*, 3 Allen, 176; *Quirk v. Holt*, 99 Mass. 164; *Kerwhacker v. Cleveland, C. & C. R. R.*, 3 Ohio St. 172.

⁵ *Loomis v. Terry*, 17 Wend. 496; *Marble v. Ross*, 124 Mass. 44, and see *Ilott v. Wilkes*, 3 B. & Ald. 304.

⁶ *Deane v. Clayton*, 7 Taunt. 528. The rule is applied in actions for injuries inflicted by vicious dogs, see *Loomis v. Terry*, *supra*; *Meibus v.*

secretly place spring-guns upon his land, and, not knowing this, a trespasser is thereby injured, the owner will be answerable.¹ And if the owner, being present, might have prevented the accident by the exercise of reasonable care, after discovering the danger, and failed to do so, he may be liable for the injury, for his negligence in such a case will be taken to be wanton and reckless.²

§ 72. **Trespasser, having Notice, takes the Risk.**—If the trespasser has notice of the danger, he takes the risk of the consequent injury. Thus it was held that a trespasser, having knowledge that there were spring-guns in a wood, although he might be ignorant of the particular spots where they are placed, could not maintain an action for an injury received in consequence of his accidentally treading on the concealed wire communicating with one of the guns and thereby discharging it.³ It is said: "There can be no doubt that, as against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he takes due care to confine himself to necessity. But . . . the defendant shall not be justified even as against a trespasser unless he give notice that the instrument of mischief is in the way."⁴ But where

Dodge, 38 Wis. 300; *Sherfey v. Bartley*, 4 Sneed, 58; and obtains although the dog be accidentally trodden upon, *Smith v. Pelch*, 2 Str. 1264, or irritated by a child. *Woolfe v. Chalker*, 31 Conn. 121. Detaching the rear part of the train and allowing it to follow the forward portion of the train at a short interval, without any warning or signal, past a station in the dark, is such negligence as will make the railroad company liable for injuries thereby occasioned to one who attempts to cross the track between the two parts of the train, although such injured person is, technically, a trespasser. *Conley v. Cincinnati, N. O. & T. P. R. R.*, 89 Ky. 402.

¹ *Bird v. Holbrook*, 4 Bing. 628, and see *Barnes v. Ward*, 9 C. B. 392; *Jordin v. Crump*, 8 M. & W. 782; *Ilott v. Wilkes*, 3 B. & Ald. 304; *Whirley v. Whitman*, 1 Head, 610; *Hooker v. Miller*, 37 Iowa, 613.

² *Frost v. Eastern R. R.*, 64 N. H. 220. This rule has often been considered in its application to cases of injuries occurring to persons trespassing upon the tracks of railroads. See § 73, *post*, and cases cited.

³ *Ilott v. Wilkes*, 3 B. & Ald. 304.

⁴ *Loomis v. Terry*, 17 Wend. 496, 499, per Cowen, J. It was said in this case that probably if the trespasser enter in the night-time with felo-

a trespasser sought to recover for injuries inflicted upon him by a ferocious bull which the defendant kept in his pasture, it was held that the plaintiff might recover notwithstanding he knew that the animal was in the pasture and was dangerous; the court saying that the fact of notice was competent upon the issue of the plaintiff's negligence in entering the pasture, but not conclusive in law as against his right to recover.¹

§ 73. Rule applied as to Trespassers on Railway Tracks or Trains. — The rule, as often stated, is that the servants of the railroad are, as to trespassers upon its track, bound to use only ordinary or reasonable care.² But it is obvious that what is reasonable care will depend upon the circumstances of each particular case, and that what might be reasonable care in the driver of a wagon on a highway might be criminal negligence in a locomotive engineer. So in the case of children trespassing upon the track, the engineer will be bound to greater watchfulness than in the case of an adult trespasser,³ unless the engineer has reason to believe that such an adult is deficient in intelligence.⁴ The servants in charge of a train have a right to assume that a person walk-

nious intent, and is injured by a savage animal kept by the owner or occupant of the premises, the latter will not be liable for the injury; but it was held, where the plaintiff entered the defendant's vineyard for the purpose of purloining grapes, and was wounded by the discharge of a spring-gun, which the defendant, without the knowledge of the plaintiff, had set to protect his fruit, that the plaintiff was entitled to recover for the damages sustained by reason of the wound. *Hooker v. Miller*, 37 Iowa, 613. See *State v. Moore*, 31 Conn. 479.

¹ *Marble v. Ross*, 124 Mass. 44.

² *Remer v. Long Island R. R.*, 48 Hun, 352; *Kelly v. Union Railway & Trans. Co.*, 95 Mo. 279; *Dahlstrom v. St. Louis, I. Mt. & So. R. R.*, 93 Mo. 99; *Gulf, C. & S. F. R. R. v. Walker*, 70 Tex. 126; *Virginia Midland R. R. v. White*, 84 Va. 228; *Lay v. Richmond & D. R. R.*, 106 N. C. 404; *Christian v. Ill. Cent. R. R.*, 71 Miss. 237; *Tucker v. Norfolk & West. R. R.*, 92 Va. 549; *Norfolk & Western R. R. v. Dunnaway*, 93 Va. 29.

³ *Indianapolis, P. & C. R. R. v. Pitzer*, 109 Ind. 179, and see *Williams v. Kansas City, S. & M. R. R.*, 96 Mo. 275; *Barkley v. Missouri Pacific R. R.*, 96 Mo. 367; *Bottoms v. Seaboard & R. R. R.*, 114 N. C. 699.

⁴ *Nichols v. Louisville & Nashville R. R.*, 6 S. W. Rep. 339 (Ky. 1888).

ing on the track will leave in season to escape danger;¹ and if they use all the means and appliances at their disposal to avoid the accident they are not to be charged with negligence, if such means and appliances are of themselves reasonably serviceable and sufficient.² It seems that a locomotive engineer is not bound to keep a special lookout for trespassers, but the rule will be different when he knows that the public, even without right, are accustomed to cross or use the track of the road, at some particular point.³ For wanton or wilful acts, on the part of its servants, by which a trespasser is injured, as where a train was run upon one walking on the track without taking reasonable means to avoid injuring him, the railroad will be liable.⁴ It has been held that a railroad will not be liable to a trespasser on its track except for wanton and malicious injury;⁵ but it is apprehended that

¹ *Tyler v. Sites*, 90 Va. 539; *Birmingham & C. Co. v. Bowers*, 110 Ala. 328; *Callaway v. Walters*, 62 Ill. App. 562; *Peirce v. Walters*, 164 Ill. 560; *High v. Carolina Cent. R. R.*, 112 N. C. 385; *Matthews v. At. & N. C. R. R.*, 117 N. C. 640; *Schmolze v. Chic., M. & St. P. R. R.*, 83 Wis. 659, distinguishing *Valin v. Milwaukee & N. R. R.*, 82 Wis. 1; *Vreeland v. Chic., M. & St. P. R. R.*, 92 Iowa, 279. See *Keefe v. Chic. & N. W. R. R.*, 92 Iowa, 182; *Omaha & R. V. R. R. v. Cook*, 42 Neb. 905. So as to the driver of a street car. *Daly v. Detroit, &c. Street Railway*, 105 Mich. 193.

² *Erwin v. St. Louis, Iron Mt. & So. R. R.*, 96 Mo. 290.

³ *St. Louis, I. Mt. & So. R. R. v. Monday*, 49 Ark. 257, and see *Bouwmeester v. Grand Rapids & I. R. R.*, 67 Mich. 87; *Carrington v. Louisville & Nashville R. R.*, 88 Ala. 472.

⁴ *Sheehan v. St. Paul & Duluth R. R.*, 40 U. S. App. 498; *Cahill v. Chic., M. & St. P. R. R.*, 46 U. S. App. 85; *Seaboard & Roanoke R. R. v. Joyner*, 92 Va. 354. See § 69, *ante*, §§ 161 *et seq.*, *post*. But it is held that a trespasser walking on a railroad track cannot recover although defendant may have been negligent in failing to give warning of the approach of the train or to comply with the statute regulating the speed of trains. *Stringer v. Ala. Min. R. R.*, 99 Ala. 397. See also *Georgia Pac. R. R. v. Ross*, 100 Ala. 490. Evidence that there was a custom to walk upon the defendant's track is of itself incompetent upon the issue of the defendant's negligence. *Memphis & C. R. R. v. Womack*, 84 Ala. 149. But the rule is otherwise if the defendant knows and permits such customary user of its tracks. *Nuzum v. Pittsburgh, C. & St. L. R. R.*, 30 W. Va. 228; *Kansas Pacific R. R. v. Whipple*, 39 Kan. 551; *Roden v. Chicago & G. T. R. R.*, 133 Ill. 72.

⁵ *Schexnaydre v. Railroad*, 46 La. Ann. 248; *Heiter v. E. St. Louis*

such a rule is not to be supported by reason, or the weight of authority. Thus it is held that if an engineer neglects to keep any lookout ahead, the railroad will be liable for any resulting injury to a trespasser on the track;¹ and so for any negligence of the train crew after the discovery that the trespasser is in peril, although the trespasser may have negligently entered on the defendant's track;² for the proximate cause of the injury in such cases is clearly the negligent act or omission of the defendant's servants, and not the antecedent negligence of the plaintiff.³ Generally, any person who crosses, walks, or lingers upon the track of a railroad, without right or necessity, is a trespasser.⁴ But it is held that persons engaged in business upon a railroad, and so called upon to cross the track from one side to the other, are not trespassers, and the road is bound to give them warning of the approach of its trains by the usual signals, although the place is not a regular crossing.⁵ It is the general rule that a railway corporation will be liable for the reckless and wanton acts of its servants in removing trespassers from its trains, if such removal was within the line of the servant's duty, even if the act complained of was not previously authorized or sub-

Con. R. R., 53 Mo. App. 331; *Powell v. Mo. Pac. R. R.*, 59 Mo. App. 626; *Chicago, B. & Q. R. R. v. Morkenstein*, 24 Ill. App. 128; *Peirce v. Walters*, 164 Ill. 560; *Blanchard v. Lake Shore & M. S. R. R.*, 126 Ill. 416.

¹ *Smith v. Norfolk & So. R. R.*, 114 N. C. 728; *Pickett v. Wilmington & W. R. R.*, 117 N. C. 616.

² *Sutzin v. Chic., M. & St. P. R. R.*, 95 Iowa, 305; *Dlanhi v. St. Louis, I. M. & S. R. R.*, 139 Mo. 291.

³ See § 100, *post*, and cases cited.

⁴ Where the track of one railway company passes close to that of another and it is the custom of the employees of the latter company without objection to step upon the track of the former company to make signals which are for the benefit of both, such employees are not trespassers. *McMarshall v. Chicago, R. I. & P. R. R.*, 80 Iowa, 737. It was held in *Strong v. Canton, A. & N. R. R.*, 3 So. Rep. 465 (Miss. 1888), that the code of Mississippi, § 1047, prohibiting locomotives from being run through towns at a greater than a certain speed, did not make the railroad company liable for an injury to a person who was walking on the track without looking or listening for locomotives, unless the company's servants saw such person before the accident.

⁵ *Owens v. Penn. R. R.*, 41 Fed. Rep. 187; *Glass v. Memphis & C. R. R.*, 94 Ala. 581.

sequently ratified by the corporation;¹ the principle being that the master is liable for the wilful acts of his servant done within the general scope of his employment.² But it is held that the act of the servant of the railroad, in such a case, cannot be considered the act of the corporation unless he was employed generally to remove trespassers, or specifically, to remove the particular trespasser.³ The question of authority, in such cases, may be for the jury.⁴

§ 74. **Exceptions to Rule, when Owner creates a Public Nuisance.** — It is a general rule that a person who creates a public or common nuisance, and so violates a public duty, is answerable in damages to any other person who suffers injury thereby. And it is settled, in England, that if the owner of land dig a pit or excavation on his own land, but so near the highway as to endanger the safety of travellers lawfully using the way, he will be liable for injuries to such a traveller, caused by the existence of such pit or excavation, although the traveller, in wandering from the line of the highway, and so falling into the pit, was technically a trespasser.⁵ To constitute a nuisance, however, the excavation must be within such a distance of the travelled way as to make it probable that travellers may fall into it.⁶ The principle of the rule is also

¹ *Planz v. Boston & Albany R. R.*, 157 Mass. 277; *Mobile & Ohio R. R. v. Seales*, 100 Ala. 368. See *Corcoran v. Concord & M. R. R.*, 56 Fed. Rep. 1014, 6 C. C. A. 231.

² See § 34, *ante*, notes, and cases cited.

³ *Marion v. Chicago, R. I. & Pac. R. R.*, 59 Iowa, 428. It has been held that a railroad is liable for injuries inflicted by its employee on a trespasser in violently ejecting him from a rapidly moving train, it being the prescribed duty of the employee to carry trespassers to the conductor of the train, and to stop the train and put them off, if so ordered to do by the conductor. *Southern Railway v. Hunter*, 74 Miss. 444.

⁴ *Planz v. Boston & Albany R. R.*, 157 Mass. 277.

⁵ *Barnes v. Ward*, 9 C. B. 392, and see *Hounsell v. Smyth*, 7 C. B. (N. S.) 731.

⁶ Where the owners of a canal and land adjacent, between it and a public way, permitted the land to be used for carting, it having the appearance of being a part of the way, it was held that they were not liable for injuries suffered by one who, using the way at night, fell into the canal, the canal and way not being adjoining each other, and the person

applied when the public nuisance exists, not upon the land of the defendant, but in any place commonly and lawfully resorted to by the public.¹ The rule of the English cases upon this subject is accepted generally in the United States.²

injured being merely a licensee, and there being no inducement by the defendants to the plaintiff to enter on land. And Mellor, J., said that the plaintiff, being merely a licensee, was bound to use the permission of the defendant subject to its dangers. *Binks v. South Yorkshire Railway*, 32 L. J. (N. S.) Q. B. 26, and see *Hardcastle v. South Yorkshire Railway*, 4 H. & N. 67. The owner of a city lot is not bound to fence or guard an excavation or pond therein not situated so near the street as to make it unsafe for persons passing. *Klix v. Nieman*, 68 Wis. 271; and see *Hargreaves v. Deacon*, 25 Mich. 9, where the same rule was applied in an action brought to recover damages for injuries received by reason of the plaintiff's falling into a cistern left uncovered on premises not immediately adjoining the highway. In these cases the injured plaintiffs were infants, and it was held that the cases did not fall within the class of *Sioux City Railroad v. Stout*, 17 Wall. 657. See NOTE, following § 78.

¹ See *Wood v. Independent School District of Mitchell*, 44 Iowa, 27. So where a defendant is engaged in a business which naturally draws numbers of people together in a public place which the public has long been accustomed to use, he is liable for an accident occurring through the use of machinery so defective as to be imminently dangerous to human life, although the person thereby injured was at the place solely to gratify his curiosity; it not appearing that he was negligent in going there. *Fitzpatrick v. Garrison & West Point Ferry Co.*, 40 Hun, 288.

² *Hayes v. Michigan Central R. R.*, 111 U. S. 228; *Beck v. Carter*, 68 N. Y. 283; *Norwich v. Breed*, 30 Conn. 535; *Stratton v. Staples*, 59 Maine, 94; *Baltimore & Ohio R. R. v. Boteler*, 38 Md. 568; *Homan v. Stanley*, 66 Penn. St. 464; *Young v. Harvey*, 16 Ind. 314; *Stewart v. Havens*, 17 Neb. 211; *Haughey v. Hart*, 62 Iowa, 96. But see *Howland v. Vincent*, 10 Met. 371, as cited *post*, § 187. It was held in Pennsylvania that if the excavation be at such a distance that in order to reach it the person falling into it must have been a trespasser, the owner will not be liable for the resulting injury. *Grumlich v. Wurst*, 86 Penn. St. 74; and see *Kohn v. Lovett*, 44 Ga. 251; but it is believed that the true criterion of liability depends upon the question whether the excavation was so near the highway as to constitute a nuisance, and so to impute wanton negligence to the defendant, and that this question is not affected by the circumstance that the plaintiff was technically, but not wilfully, a trespasser. So it is held in Connecticut that the liability of one who maintains an unguarded excavation on his own premises, near the public street, depends upon the dangerous condition in which he leaves it, rather than upon its distance from the highway. *Crogan v. Schiele*, 53 Conn. 186, and see *Baltimore & Ohio R. R. v. Boteler*, 38 Md. 568. A building so badly

§ 75. **As to Infant or Ignorant Trespassers.** — The rule seems to be well settled that one who recklessly and without necessity leaves exposed dangerous weapons, or things, by meddling with which ignorant persons or infants may be injured, are liable for such injuries although in so meddling the injured person was a trespasser. In the leading case upon this subject it appeared that the defendant had carelessly left his horse and cart unattended in the open street where children were playing. The plaintiff, an infant of seven years, climbed upon the cart, in play, and another child incautiously led the horse along and the plaintiff was injured. It being admitted that the plaintiff was a trespasser, it was held that the defendant under the circumstances was guilty of reckless and wanton negligence, and so that the plaintiff might recover, and Lord Denman, C. J., said the case was as if a game-keeper should leave his loaded gun within the reach of a child who should play with the gun and so suffer an injury.¹ This case has been often referred to and is accepted generally as authority, but the principle upon which it rests seems in some cases not to have been rightly apprehended.²

§ 76. **Reasons and Limitations of the Rule.** — It is apprehended that the rule in these cases rests upon the general principle that the defendant owes to the whole community the duty of abstaining from the unnecessary doing of anything, upon his own ground or with his own property, which shall put others in peril, the principle being expressed in the maxim *sic utere tuo ut alienum non laedas*, and the law takes the defendant to know that the community includes persons of weak or undeveloped capacity. But the owner of property owes no special duty to the injured person merely because such person is an infant or incapable, nor is he responsible for the injury suffered by such person unless the circumstances show the injury to have been wantonly inflicted.³ It is said: "The superconstructed as to be dangerous is a nuisance for which the owner is responsible, and the doctrine of independent contractors does not apply. *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405.

¹ *Lynch v. Nurdin*, 1 Q. B. R. 29.

² See NOTE, following § 78.

³ *Clark v. Manchester*, 62 N. H. 577; *Frost v. Eastern R. R.*, 64 N. H.

posed duty has regard to the public at large, and cannot well exist as to one portion of the public and not to another under the same circumstances. In this respect, children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, . . . but precautionary measures having for their object the protection of the public must . . . have reference to all cases alike." In the same case it was held that a railroad company was not bound to fence its track in order to keep children from trespassing thereon, and further that the fact that plaintiff who had wandered upon the track and received an injury from a passing train was a child seven years old did not create any peculiar duty on the part of the defendant to guard the child from injury.¹ Where a child four years old living on the line of a railroad, strayed across the tracks in front of his house to the opposite side, where there was no fence, although it was the duty of the railroad to maintain one, and thence into land adjoining, where he fell into a ditch and was injured, it was held that the railroad was not liable for the injury, since its only duty was to protect the plaintiff from injury on its own land.² And where a child climbed over the guards erected around machinery used in the construction of a public sewer, and was injured, it was held that the municipality owed him

220; *Gillespie v. McGowan*, 100 Penn. St. 144, overruling *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332; *Grindley v. McKechnie*, 163 Mass. 494.

¹ *Nolan v. New York, N. H. & H. R. R.*, 53 Conn. 461.

² *Morressey v. Providence & Worcester R. R.*, 15 R. I. 271. To the point that a railroad company owes no special duty to a child of tender years trespassing on a railway track, or to his parent, see also, *Cauley v. Pittsburg, C. & St. L. R. R.*, 95 Penn. St. 398; *Duff v. Allegheny Valley R. R.*, 91 Penn. St. 458; *Pennsylvania R. R. v. McMullen*, 132 Penn. St. 107; *Mitchell v. Philadelphia, W. & B. R. R.*, 132 Penn. St. 226; *Curley v. Missouri Pacific R. R.*, 98 Mo. 13; *Morrissey v. Eastern R. R.*, 126 Mass. 377; *McEachern v. Boston & Maine R. R.*, 150 Mass. 515, and see cases cited in note, following § 78, *post*. But it is admitted that the servants of a street or steam railroad are bound to use greater precautions when they perceive that a child is walking upon the track in front of a moving train than they are bound to use in the case of an adult in a similar situation. See § 73, *ante*; *Wynn v. City & Suburban Railway*, 91 Ga. 344.

no special duty as to protection.¹ Where the owner of a ferocious dog left it at liberty in or near his vehicle, on the highway, and a child seven years old, passing on the highway, came to the vehicle and meddled with a whip lying therein and was thereupon bitten by the dog, it was held that the owner of the dog was liable for the injury, and that the fact that the child was meddling with the whip was no defence. But the liability of the defendant was held to rest not upon any peculiar duty which he owed to the child, but upon the fact that he knew the disposition of the dog, and that when left to guard his carriage in the public street it had attacked travellers.²

¹ *Hamilton v. Detroit*, 105 Mich. 514.

² *Meibus v. Dodge*, 38 Wis. 300. To the general rule that an infant trespasser risks the consequences of his trespass, see *Gaughan v. Philadelphia*, 119 Penn. St. 503; *Clarke v. Richmond*, 83 Va. 355; *Louisville & Nashville R. R. v. Hurt*, 13 S. W. Rep. 1092 (Ky. 1890); *Kentucky Central R. R. v. Gastineau*, 83 Ky. 119. An owner of land is not bound to fence his vacant lot so as to protect infant trespassers from injury by falling into pits or excavations or other dangers on the land. *Klix v. Nieman*, 68 Wis. 271; *Galligan v. Metacomet Manuf'g Co.*, 143 Mass. 527; *Miller v. Pennsylvania R. R. Co.*, 8 At. Rep. 209 (Penn. 1887). A city is not liable for a death resulting from an infant child going upon the land of the city without invitation, though without objection, and falling into an abandoned reservoir in process of being filled with earth, and this although the place was unguarded and such as might be expected to allure children. *Clark v. Manchester*, 62 N. H. 577; *Jewett v. Keene*, 62 N. H. 701. It was held that a defendant was not liable for injuries caused to a child by steam escaping upon waste ground of the defendant, in the absence of testimony that the place was made attractive to children by reason of the discharge of steam there, or that children were in the habit of resorting to the place to play. *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284. Where a boy in play was sliding down an awning post in a sidewalk, and in so doing struck an ash barrel which was upon the sidewalk in violation of a city ordinance, and the barrel fell upon and injured him, it was held that the city was not liable. *Gaughan v. Philadelphia*, 119 Penn. St. 503. In an action against an ice company for negligently causing the death of the plaintiff's intestate, a child of seven years, it appeared that the defendant's wagon was standing in the street, and that the child was playing with others on the sidewalk; that after the driver had taken his place, and another employee of the defendant had looked on both sides of the wagon and called out "all right," the child ran to the wagon, placed herself between the wheels, and was killed. It was held as matter of law that no negligence on the part of the defendant was shown. *Henderson v. Knickerbocker Ice Co.*, 22 N. Y. S. Rep. 530.

§ 77. **Question, whether the Defendant's Act was wilfully mischievous.** — It would seem in any case, although the injured person be an infant, that in order to charge the defendant with responsibility for the injury, it must appear that the act complained of was wilfully mischievous, as by leaving a ferocious dog at liberty to attack passers-by.¹ But that act is not to be deemed mischievous or wanton which the defendant does in the ordinary course of his business, and by the use of appliances which do not, obviously, and of necessity, expose all persons who may approach them to peril, or the exposure of which is not attended with some concealed danger.² Thus if a druggist were to expose for sale in the door of his shop, without warning, an open cask of arsenic, and an infant trespasser were to taste the arsenic, supposing it to be sugar, and thereby be injured, it is apprehended that the act of the druggist in exposing the poison would be held wilfully mis-

¹ *Meibus v. Dodge*, 38 Wis. 300.

² In *Schilling v. Abernathy*, 112 Penn. St. 437, it was held that the defendant owner of land was liable for an injury received by a child by the falling upon him of a ruinous wall abutting on an alley upon the defendant's land, in which the plaintiff was trespassing, and it was held that "where one who has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the rule that where no duty is owed no liability arises will not prevail." It is believed that the liability in such a case depends upon whether the danger to be apprehended is so grave or so imminent as to warrant the conclusion that the owner was wantonly reckless in permitting it to exist. It is said by Brett, M. R., that "whenever one person is by circumstances placed in such a position in regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." *Heaven v. Pender*, L. R. 11 Q. B. D. 503, 509. The principle governing the English cases was illustrated in *Hughes v. Macfie*, *Abbott v. Mackfie*, 2 H. & C. 744. The defendant was the proprietor of a cellar which had an opening into the public highway, which opening was closed by a trap-door or lid. The entrance was left open with the lid resting against the wall. The first of two children passing along the highway meddled with the lid, and it fell upon both children and injured them. It was held that the proprietor was not liable to the first child, he being a trespasser in meddling with the lid; and that there would be a liability as to the second child, if he was not a joint trespasser with the first.

chievous. But on the other hand where the defendant exposed in a public place, for sale, unfenced and without superintendence, a machine which might be put in motion by any passer-by, and which when in motion was dangerous, and the plaintiff, a boy four years old, by the direction of his brother seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and the plaintiff's fingers were crushed; it was held, setting aside the question of contributory negligence, that the defendant was not liable, since the act of the defendant in exposing the machine was not wilfully mischievous, and so, as to the plaintiff, not negligent.¹ So where a person who was employed to drill a well in the grounds of a school-house left his drilling machine unlocked and unguarded in his absence, and a child lawfully in the grounds meddled with the machine and so was injured, it was held that he was without remedy, the machine being stationed where it was for a proper and necessary purpose.² Where the servants of a railroad company, following the regulations of the road, placed upon the track a torpedo for a necessary purpose, that is, for a danger signal, and the plaintiff, without reason, picked up the torpedo, which exploded and injured him, it was held that he could not recover for his injuries.³ On the other hand, when the act of the servants of the road in placing the torpedo, at a point on the road where the corporation had customarily permitted persons to cross was needless, unauthorized, and mischievous, the corporation was held liable to a child who ignorantly picked up the torpedo and was injured thereby.⁴ So where the plaintiff, a boy of eleven, mounted the ledge of a tender of a locomotive, paying no attention to repeated requests of the engine crew to dismount, which he easily might have done, and one of the crew threw cold water upon him, when he jumped and fell

¹ *Mangan v. Atterton*, L. R. 1 Ex. 239. See *Holbrook v. Aldrich*, 168 Mass. 15.

² *Wood v. Independent School District of Mitchell*, 44 Iowa, 27.

³ *Carter v. Columbia & Greenville R. R.*, 19 S. C. 20.

⁴ *Harriman v. Pittsburg, C. & St. L. R. R.*, 45 Ohio St. 11. See also *Bellefontaine & Indianapolis R. R. v. Snyder*, 18 Ohio St. 399; *Barry v. New York Central & H. R. R. R.*, 92 N. Y. 289.

under the wheels of the locomotive, which was then moving rapidly, it was held that the question of the defendant's negligence was for the jury.¹

§ 78. **Rule applied in Favor of Railway Companies.** — It was held that a railway corporation was not liable to a boy, who, while trespassing upon the land of the company adjacent to the highway, climbed, in play, into an open freight car there standing, and was injured by the falling upon him of the door of the car, which was insecurely hung. The court considered that the fact that the defendant knew that the car was left upon the track where it would be "an enticing, attractive, and inviting object to children," and that children were and had been accustomed to play in and about such cars, upon the defendant's side tracks, was not an invitation or inducement held out by the plaintiff to the defendant, and that the defendant owed no duty to the plaintiff, he being a trespasser.² It is held, further, to be no part of the duty of a railway corporation to maintain a guard over its cars left standing on its tracks, in order to protect children, playing about them, from injury;³ and, generally, in operating its trains, a railroad owes no more duty towards an infant, as such, than towards an adult trespasser.⁴

¹ *Branham v. Central R. R.*, 78 Ga. 35.

² *McEachern v. Boston & Maine R. R.*, 150 Mass. 515, and see *Curley v. Missouri Pacific R. R.*, 98 Mo. 13. In *Biddle v. Hestonville Passenger R. R.*, 112 Penn. St. 551, it was held that where a child trespassing on the platform of a street car was compelled by the driver to jump from the car just as the driver started up the car with a jerk, and so was injured, that the defendant was responsible, but the liability was placed upon the general duty of the defendant not wantonly to injure even a trespasser. See also *Philadelphia & Reading R. R. v. Hummell*, 44 Penn. St. 375; *Pennsylvania R. R. v. Lewis*, 79 Penn. St. 33; *Hestonville Passenger R. R. v. Connell*, 88 Penn. St. 522; *Pittsburg, A. & M. Passenger R. R. v. Caldwell*, 74 Penn. St. 421.

³ *Chicago & Alton R. R. v. McLaughlin*, 47 Ill. 205; *Central Branch Union Pacific R. R. v. Henigh*, 23 Kan. 347.

⁴ *Felton v. Aubrey*, 43 U. S. App. 278.

NOTE. — AS TO CERTAIN APPLICATIONS OF THE DOCTRINE OF *LYNCH v. NURDIN*. In *Lynch v. Nurdin*, 1 Q. B. R. 29, see *supra*, § 75, Lord Denman said: "Supposing . . . that the plaintiff merely indulged the

natural instinct of a child in amusing himself with an empty cart and deserted horse . . . the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness . . . having tempted the child, he ought not to reproach the child with yielding to that temptation." It would seem to be upon this expression that those cases rest which intimate that the owner of property owes a special duty towards infant trespassers coming upon it, beyond his general duty of abstaining from inflicting upon any person in the community a wanton injury. Thus, in *Birge v. Gardiner*, 19 Conn. 507, the defendant's gate between his close and a public way was insecurely hung. The plaintiff, a child of seven years, being in the way, climbed upon and shook the gate, which fell upon and injured him. It was considered that by an application of the doctrine of *Lynch v. Nurdin* the plaintiff might recover although he were a trespasser; but it is apprehended that the facts to warrant the inference of culpable and wanton carelessness were so much the stronger in the latter case as to make the cases clearly distinguishable. And for a case in which the contrary rule was heard upon similar facts, see *McEachern v. Boston & Maine Railroad*, 150 Mass. 575, as cited § 78, *ante*, and also *McGuinness v. Butler*, 159 Mass. 233. So in *Angus v. Findlay*, 24 Scot. Law. Rep. 237, the defendant had erected a shed on some waste land in a town, being a place to which the public resorted and where children were accustomed to play. The door of the shed was not so fastened that it would resist the pressure and interference with it that ought to be expected in such a place, and the door being tampered with by a child, it fell upon and injured him. The defendant was held to be liable for the injury, but this was expressly upon the ground that the owner had put his building in a place where he knew that the public were admitted by the same kind of tolerance which was extended to himself, and it was said that the case would have been different if the accident had happened upon private property. In *Daley v. Norwich & Worcester R. R.*, 26 Conn. 591, it was held that the defendant might be liable for injuries suffered by a child of three years old playing upon its track, by reason of the defendant's negligent management of a train of cars, it not appearing that the negligence of the defendant was wanton. But where, under similar circumstances, a child was injured by a passing train, it was held as matter of law that he could not recover in the absence of proof that the defendant was grossly careless. *Morrissey v. Eastern Railroad*, 126 Mass. 377. In a case in which a child was injured while playing upon the turn-table of a railroad corporation, it was held in the Supreme Court of the United States, that while a railway company is not bound to the same degree of care as to strangers who are unlawfully upon its premises, that it owes to passengers, it is not exempt from responsibility to such strangers for injuries resulting from its tortious acts; and the question was left to the jury to determine whether the corporation exercised proper care in the premises. *Sioux City & Pacific Railroad Co. v. Stout*, 84 U. S. 657. (See *Stout v. Sioux City & Pacific*

R. R., 2 Dill. 294.) The court said: "That the turn-table was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turn-table on other occasions, and within the observation and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case." Under that view of the law which holds that the leaving a dangerous machine unguarded is necessarily negligence, as to an infant or ignorant trespasser, the finding, from the occurrence of the accident, that the turn-table was a dangerous machine, is in accordance with the principle laid down by the same court in *Stokes v. Saltonstall*, 13 Peters, 181 (1839), that the fact that the plaintiff was injured was *prima facie* evidence of the defendant's negligence, — a principle which has also been adopted by the court in Pennsylvania, see *Laing v. Colder*, 8 Penn. St. 479, 484; *Sullivan v. Philadelphia & Reading R. R.*, 30 Penn. St. 234; *Philadelphia & Reading R. R. v. Anderson*, 94 Penn. St. 351, but which cannot be said to be supported by the tenor of the authorities. See § 111, *post*. It was further held that, upon the facts disclosed in the case, "it was to be expected that the amusement of the boys would be found in turning this table while they were on it or about it," and that this could have easily been prevented by proper precautions; and the case seems to assume, as a rule of law, that the owner of land or property owes to infants a peculiar duty, that is, to so guard it that they shall not suffer harm while unlawfully meddling with or trespassing upon. It appeared clearly, upon the facts in the case, that the turn-table was easily accessible, and, when meddled with by ignorant or careless persons, a dangerous machine, and the court considered that the case might well be governed by that of *Lynch v. Nurdin*. But it would seem that the case, upon this point, is to be distinguished since, in *Lynch v. Nurdin*, the act of the defendant in leaving his horse and cart unattended in the highway was unnecessary, and so wantonly careless, while the turn-table was a fixture necessary to the carrying on of the defendant's business. See § 77, *ante*, and cases cited. If the doctrine of this case and those which follow it be pushed to its logical conclusion, it would seem clearly to establish an exception to the general rule of law in favor of infants or other persons of feeble capacity, and thus, in many cases, introduce the question of capacity for the determination of the

jury. The rule of this case was approved in Minnesota, where it was held, generally, that the owner of dangerous machinery who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to play with it and may be injured, is bound to use reasonable care to protect such children from the danger to which they are thus exposed. *Keffe v. Milwaukee & St. Paul Railway*, 21 Minn. 207. The court considered that leaving a turn-table unguarded was an implied invitation to the child to meddle with it, and that therefore the defendant became liable, as to the child, as to one entering premises by inducement, or at least as a licensee. But it would seem that to place the rule upon this ground is to say that the act of the child is not a trespass if the doing of it seems to him sufficiently attractive to induce him to commit it. See *McEachern v. Boston & Maine Railroad*, 150 Mass. 515. And such a rule finds no support in the case of *Lynch v. Nurdin*, since in that case, although it was said that the defendant ought to have anticipated the plaintiff's act, it was considered that the plaintiff was a trespasser. Moreover, it is a familiar rule that even the passive acquiescence of the owner in the use of his premises, or failure on his part to prohibit such use, is not sufficient to constitute an implied invitation or inducement held out by him. See *Galligan v. Metacomet Mfg Co.*, 143 Mass. 527, and cases cited § 66, *ante*. But it is to be observed that an exception to this general rule may arise when the condition of the defendant's premises is such as to induce the supposition that these are open to the general public as a way, see *Binks v. South Yorkshire Railway*, 32 L. J. (N. S.) Q. B. 26, and in such a case one trespassing unwittingly upon the premises, whether an infant or an adult, may hold the owner liable for injuries received by reason of dangers existing on the land. The case of *Keffe v. Milwaukee & St. Paul Railroad*, *supra*, was followed in *O'Malley v. St. Paul, Minneapolis & Manitoba Railroad*, 43 Minn. 289, and see *Kolsti v. Minneapolis & St. Louis Railway*, 32 Minn. 133, and *Twist v. Winona & St. Paul R. R.*, 39 Minn. 164. In the latter case it was held that the plaintiff, a boy ten and one half years old, was debarred from recovery as being guilty of contributory negligence. The same view of the laws obtains in Missouri; *Koons v. St. Louis & Iron Mt. R. R.*, 65 Mo. 592; *Nagel v. Missouri Pacific Railway*, 75 Mo. 653, and, in *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284, the principle was affirmed as to dangerous machinery generally. In *Emerson v. Peteler*, 35 Minn. 481, the rule was held not to apply to a case where a contractor for grading a public street used cars for the conveyance of the material used by him in the work, which cars were only dangerous to persons attempting to ride upon them, and it was said that it was not the defendant's duty to see that children did not attempt so to ride upon them. But see *Ratte v. Dawson*, 50 Minn. 450. In Mississippi, where a municipal corporation made an excavation in private property of such a character as to entice an infant trespasser into it, to play, it was held, on the authority of *Sioux City, &c. Railroad v. Stout*, that the municipality was

liable for the injuries received by the child by reason of the dangerous character of the excavation. *Mackey v. Vicksburg*, 64 Miss. 777, and see *Vicksburg v. McLain*, 67 Miss. 4; *Pekin v. McMahon*, 154 Ill. 141. The rule of the federal courts upon this subject is also followed in Texas: *Gulf, Colorado & Santa Fe Railway v. Styron*, 66 Tex. 421; *Gulf, Colorado & S. F. Railway v. McWhirter*, 77 Tex. 356; *Evansich v. Gulf, Colorado & S. F. Railway*, 57 Tex. 126; in Georgia, *Ferguson v. Columbus & Rome Railway*, 65 Ga. 637, 77 Ga. 102; in South Carolina, *Bridger v. Asheville & Spartanburg R. R.*, 25 S. C. 24; and in Kansas, *Kansas Central Railway v. Fitzsimmons*, 22 Kan. 606; *Union Pacific R. R. v. Dunden*, 37 Kan. 1. But the court in Kansas refused to apply the principle of the case where the defendant corporation had left a car unguarded, and with its brake set but unlocked, upon a steep grade, and a child climbed upon the car, unfastened the brake, set the car in motion, and was thereby injured. *Central Branch, Union Pacific R. R. v. Henigh*, 23 Kan. 347. It was said that the rule of the "turn-table cases," so called, does not obtain as to the stock pen and chute of a railway company, so as to require the company to keep this enclosed or guarded against trespassing boys, it being itself a substantial enclosure. *Gulf, Col. & Santa Fe R. R. v. Cunningham*, 7 Tex. Civ. App. 65. In Illinois, where a turn-table not covered with plank or walled except where the rails of the switch intersected, was constructed not near to any public street or place where the public were in the habit of passing, but in an isolated place, and a boy about nine years old, while he and other children were turning and riding upon it, was injured, it also appearing that the table was latched but not locked, it was held that, considering the isolated situation of the table, the railroad company owning the table was not responsible for the injury. *St. Louis, Vandalia & Terre Haute R. R. v. Bell*, 81 Ill. 76. In *Kerr v. Forgue*, 54 Ill. 482, and *Kunz v. Troy*, 104 N. Y. 344, the defendant was held liable for injuries caused to a child in the public street by the falling of counters, barrels, etc., negligently piled by the defendant upon the sidewalk. The cases seem to have been decided upon the ground of a peculiar duty existing towards infants, but it seems that the defendant's liability might well have been taken to arise out of the fact that his act created a nuisance in the public street; and see also *Indianapolis v. Emmelman*, 108 Ind. 530. In *McDonald v. Union Pacific R. R.*, 152 U. S. 262, it appeared that the defendant had customarily deposited hot slack from its shops or locomotives upon an open vacant lot of land owned by it. At the time of the injury sued for there was a mass of such heated slack upon the lot, covered with ashes and showing no appearance of heat. The plaintiff, a boy twelve years old, ran across the lot and was burned. The court, approving the principle of *Sioux City, &c. Railroad v. Stout*, held that the plaintiff, under the circumstances disclosed, was not a trespasser and that the defendant, being negligent in its management of the premises, the plaintiff might recover. In *Harriman v. Pittsburg, C. & St. L. Railway*, 45 Ohio St. 11, 29, the doctrine of "invitation" to infant

trespasser was approved, but the case was determined upon other grounds. In *Clarke v. Richmond*, 83 Va. 355, a child, while walking on the top of a coping owned by a private person adjoining the public sidewalk, fell into an excavation made by the city, and it was held that, being a trespasser, he could not recover for his injuries in an action brought against the municipality, and that the coping was not a structure "attractive" to children within the meaning of that expression as used in the cases. In Kentucky, it was held, where the defendant had stacked a quantity of lumber in a negligent and dangerous manner upon his open lot abutting on a public street in a city, and a child playing upon the lumber was injured, that it was the defendant's duty to make the lumber reasonably safe, and that he was answerable in damages for the injury to the child. *Bransom v. Labrot*, 81 Ky. 638, distinguishing *Louisville & Portland Canal Co. v. Murphy*, 9 Bush, 522. See *Brinkley Car Co. v. Cooper*, 60 Ark. 545; *Catlett v. Railway Co.*, 57 Ark. 461; *Passamaneck v. Louisville R. R.*, 98 Ky. 195. In *Frost v. Eastern R. R.*, 64 N. H. 220 (1886), a case in which the plaintiff, a child, had suffered injury by reason of his meddling with a railroad turn-table, Clark, J., said: "We are not prepared to adopt the doctrine of *Railroad Co. v. Stout*, 17 Wall. 657, and cases following it, that the owner of machinery or other property attractive to children is liable to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handlings, nor is the owner of a fruit-tree bound to cut it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying or trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant does not raise a duty where none otherwise exists." See also *Nolan v. New York, N. H. & H. R. R.*, 53 Conn. 461; *Wood v. Independent School District of Mitchell*, 44 Iowa, 27; *Mangan v. Atterton*, L. R. 1 Exch. 239, and cases cited *ante*, §§ 76, 77. In *Daniels v. New York & N. E. R. R.*, 154 Mass. 349, it was held that a child attracted to railroad premises by a turn-table left unlocked or unguarded thereon, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, cannot recover for personal injuries sustained while at play upon the turn-table; either on the ground that the defendant held out to the child an implied invitation to come there, or on the ground of a duty subsisting on the part of the defendant to prevent children from interfering or playing with the turn-table. The opinion in the case contains an elaborate discussion of the similar reported cases, and holds that the question of liability is to be determined by the ordi-

(c) *As to Licensees.*

§ 79. **Owner's Obligation to, Generally.** — A mere naked license or permission to enter upon the premises will not create a duty in favor of the person entering, or impose upon the owner or tenant who grants the license an obligation to provide against dangers or accidents which may arise out of the existing condition of the premises; for the licensee goes upon the premises "subject to all the dangers attending his going;"¹ and so enjoys the license subject to its concomitant perils.² Thus, the owner is not liable for injuries received by

nary rules which obtain as between the owners of property and trespassers or intruders thereon; and that, therefore, the case is governed by former Massachusetts decisions in which the ordinary rules as to liability are applied. (See *Morrissey v. Eastern R. R.*, 126 Mass. 377; *Wright v. Boston & Albany R. R.*, 142 Mass. 296; *McEachern v. Boston & Maine R. R.*, 150 Mass. 515; *McCarty v. Fitchburg R. R.*, 154 Mass. 17); and the court say: "The plaintiff was a mere trespasser on the land of the defendant. We find no evidence of any invitation by the defendant, or inducement held out to him to go there, and no evidence of a breach of any duty which it owed him."

¹ *Holmes v. Northeastern Railway*, L. R. 4 Ex. 254; *Sullivan v. Waters*, 14 Ir. C. L. 460; *Nicholson v. Erie R. R.*, 41 N. Y. 529; *Beck v. Curtis*, 68 N. Y. 283; *Parker v. Portland Publishing Co.*, 69 Maine, 173; *Files v. Boston & Albany R. R.*, 149 Mass. 204, 206; *Reardon v. Thompson*, 149 Mass. 267; *Blackman v. Toronto Street Railway*, 38 U. C. Q. B. 173; *Splitdorf v. State*, 108 N. Y. 205. Where a person built a bridge from his own land on one side of a stream to the public highway on the other, which bridge had been more or less used by the public, but without invitation or any advantage accruing to the owner from such user, and the bridge had become visibly decayed, and the plaintiff, for his own pleasure merely, and without invitation from the defendant, attempted to cross it, and in so doing was injured, it was held that the defendant owed the plaintiff no duty as to the bridge, and was not responsible for the injury. *Cusick v. Adams*, 115 N. Y. 55. It was held that a landowner was not liable to a mere licensee for injuries which the latter suffered by reason of an excavation existing by the side of a private way built by the landowner for his own accommodation through his own land, unless it appeared that the landowner was informed of the dangerous condition of the road. *Eisenberg v. Missouri Pacific R. R.*, 33 Mo. App. 85.

² *Sweeney v. Old Colony & Newport R. R.*, 10 Allen, 368; *Zoebisch v. Tarbell*, 10 Allen, 385.

a licensee by falling into an excavation left unfenced upon the land,¹ or by the existence of obstructions, as logs, lying in the path.² Nor is the owner of a building bound to fence or enclose dangerous machinery contained in it for the protection of a mere licensee.³ It is said that, as respects his remedy against the owner or occupant for injuries received upon the land, a licensee holds a more favorable position than a trespasser, but the different principles which govern the respective cases have not been clearly defined. It is apprehended that as the owner must be taken to be affected with knowledge of the licensee's user of the premises, he may therefore be bound to exercise a stricter care than he would be held to exercise were he ignorant of such user, and especially may he be bound not to create upon the land dangers such as did not exist at the granting of the license and which the licensee ought not to be bound to anticipate. Thus, as to the liability of railway companies to persons entering upon their tracks by license, it is said: "We think there is a very clear distinction between the care which a railroad company is bound to exercise towards a mere trespasser and one who is on its right of way by the license of the company. In the case of the mere trespasser, the company or its servants have no cause to anticipate that he will be on the track or in the way of danger, and, therefore, a mere neglect to keep a lookout might not be such neglect as would render the company liable for running upon or injuring him." But "where the company know that the right of way is constantly used with its acquiescence by the public as a footway, its servants are charged with notice that it will be so used, and they cannot, without fault, proceed in a manner which must necessarily be dangerous to the persons so using the same."⁴ It is held

¹ *Blithe v. Topham*, Cro. Jac. 168; *Jordin v. Crump*, 8 M. & W. 782; *Hardcastle v. South Yorkshire Railway*, 4 H. & N. 67; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Reardon v. Thompson*, 149 Mass. 267.

² See *Deane v. Clayton*, 7 Taunt. 522.

³ *Matthews v. Bonsee*, 51 N. J. L. 30; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; *Galveston Oil Co. v. Morton*, 70 Tex. 400.

⁴ *Davis v. Chicago & Northwestern Railway*, 58 Wis. 646. See *Thomas v. Chic., M. & St. P. R. R.*, 103 Iowa, 651; *Norfolk & Western R. R. v. Wilson*, 90 Va. 263; *Blankenship v. Ches. & Ohio R. R.*, 94 Va. 449;

that a railroad which has licensed the use of its grounds and track by pedestrians for a way is bound to provide for a careful lookout in the direction in which a train is moving, in places where people are likely to be on the track, and to signal the approach of trains to persons in positions of danger.¹ A statute which makes it unlawful to walk along the track of a railroad has no application to a licensed path in and about station grounds.²

§ 80. **Invitation and License.** — In cases of doubt, it may be a difficult question of fact whether the person entering the premises comes by implied invitation of the owner or whether he is a licensee merely. It would seem that where the owner permits a constant use of his premises to all persons without objection, although in such a case there is an implied invitation to the public, each person availing himself of it enters the premises as a licensee merely.³ One who enters the plaintiff's premises, as by an implied invitation, to transact business with the plaintiff, and, after he has transacted his business, lingers upon the premises without excuse or necessity, is, at best, a licensee; as where a person remains in a railway station after a train has gone which he came to the station intending to take, but missed.⁴ One entering premises by invitation is bound to use the ordinary ways of access and egress, these being reasonably safe and sufficient, and, if he

Philadelphia & Reading R. R. v. Hummell, 44 Penn. St. 279; *Burton v. Western & Atlantic R. R.*, 99 Ga. 783; *Seymour v. Cent. Vt. R. R.*, 69 Vt. 555.

¹ *Johnson v. Lake Superior Terminal Co.*, 86 Wis. 64; *Hammill v. Louisville & N. R. R.*, 93 Ky. 343.

² *Mason v. Chic., R. I. & Pac. R. R.*, 89 Wis. 151.

³ *Hooker v. Chicago, M. & St. P. R. R.*, 76 Wis. 542; *Redigan v. Boston & M. R. R.*, 155 Mass. 44.

⁴ *Heinlein v. Boston & Providence R. R.*, 147 Mass. 136. See, also, *Pittsburg, Fort Wayne & Chicago R. R. v. Bingham*, 29 Ohio St. 364. It has been held that a member of a fire department who in the discharge of his duty enters a building to extinguish a fire enters as a licensee merely, and if while there he falls into a negligently guarded elevator well, the owner of the building is not liable. *Beehler v. Daniels*, 18 R. I. 563

takes some other way, he becomes a licensee.¹ Ordinarily, a naked permission gives a license merely.²

§ 81. **As to Notice.** — It appears to have been held in England that the owner of land is not, as to a licensee, to be held responsible for an accident if he had no knowledge of the defect that caused it;³ but this would not seem to be a sound rule, and it is certain that it is the duty of the owner to warn the licensee of any particular danger to which the latter will be exposed in coming upon the premises, which danger is known, or ought to be known, to the owner but not to the

¹ *Armstrong v. Medbury*, 67 Mich. 250.

² *Benson v. Baltimore Traction Co.*, 77 Md. 535; *Bolch v. Smith*, 7 H. & N. 736. In the latter case, it appeared that the plaintiff, a workman for the defendant, was injured by coming in contact with an unguarded revolving shaft which extended across a path leading to closets in the rear of the defendant's works, which closets and path the plaintiff and his fellow-workmen had been accustomed to use by the permission of the defendant. It appeared that there was another way over the defendant's land by which the plaintiff might have reached the closets without exposing himself to danger from the shaft. It was held that the plaintiff could not recover, on the ground that he was a licensee merely, and Martin, B., said: "It is said that the plaintiff had a right to go along the path across which the machinery was erected. . . . But that is a fallacious argument. It is true that the plaintiff had permission to use the path. Permission involves leave and license, but it gives no right. If I avail myself of permission to cross another man's land, I do so by virtue of a license, not of a right. . . . It is an excuse or license, so that the party cannot be treated as a trespasser." Wilde, B., concurred. It would seem that the court here use the term "right" as limited in its meaning to express the ownership of a corporeal hereditament, that is, of the soil and of the erections upon it, or at least of an easement therein; for it would seem to be obvious that a permission must, until revoked, always give the right to do the thing permitted without wilful or malicious molestation on the part of the person giving the permission, and it is believed that, if the case is intended to express a different rule, it cannot be supported either by principle or authority.

³ *Welfare v. London & B. Railway*, L. R. 4 Q. B. 693; *Southcote v. Stanley*, 1 H. & N. 247. Commenting on this case, Cockburn, C. J., says that he conceives that it stands entirely upon the relation of host and guest, and was decided upon this principle that one who chooses to become a guest cannot complain of the insufficiency of the accommodation afforded him. *Corby v. Hill*, 4 C. B. (N. S.) 556, 565. No authorities are cited to support the principle thus stated by implication.

licensee.¹ For it is obvious that the licensee enters the premises by right, though solely for his own advantage, so long as the license subsists, and so is entitled to a reasonable protection. Thus, the owner of land may render himself liable to one whom he has licensed to come upon the premises, if he makes any change in the condition of the land which adds to the danger of entering upon it, and fails to inform the licensee of such change, the latter being ignorant of it.² But it has been held that the owner will not be put upon inquiry to find dangers on his premises, nor be responsible for their existence unless they be obvious.³

SECTION VII.

LIABILITY OF THE OWNER OF LEASED PROPERTY.

(a) *To the Tenant.*

§ 82. **Generally : Does not warrant the Condition of the Premises : Tenant takes the Risk.**—In the ordinary contract of letting, the law does not imply any warranty on the part of the landlord that the leased premises are in a safe or inhabitable condition,⁴ since the tenant, ordinarily, has it in his power to in-

¹ *Samuelson v. Cleveland Iron Mining Co.*, 49 Mich. 164; *McKone v. Mich. Central R. R.*, 51 Mich. 601; *Powers v. Harlow*, 53 Mich. 507. In the latter case the license was to come upon the premises to transact business with the owner, and would thus seem to amount to an implied invitation.

² *Corby v. Hill*, 4 C. B. (N. S.) 556; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Bennett v. Louisville & Nashville R. R.*, 102 U. S. 577; *New Orleans, M. & C. R. R. v. Hanning*, 15 Wall. 649.

³ *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391. In this case it was held that one who went upon the land of another without invitation, for the purpose of obtaining employment from the owner of the land, was not entitled to recover damages for injuries caused by a defective machine on the premises, not obviously dangerous, and that although the owner could have ascertained the defect by the exercise of reasonable care, yet he owed the plaintiff no duty to keep the machinery in repair.

⁴ There are authorities which hold that where premises are let for purposes of occupation, there is an implied condition that they shall be fit for use. See *Smith v. Marrable*, 11 M. & W. 5; *Edwards v. Hetherington*,

spect the premises, and so accepts the tenancy at his own risk, there being no fraud or concealment on the part of the landlord, and the existing defects or dangers being apparent to a careful observer.¹ If therefore during his tenancy the tenant, or his servant, suffers a personal injury by reason of the defective or dangerous condition of the premises, or their faulty construction, he, generally, cannot hold the landlord responsible therefor.² This is so although, as to the preceding tenant, the landlord may have been guilty of trespass by stripping the premises.³

§ 83. **So as to Persons in Privity with the Tenant.**— Since the possession of the leased premises is in the tenant, persons who occupy by his permission, or as members of his family, cannot be considered as occupying by the invitation of the landlord, and the right of such persons to sue for injuries received upon the premises is to be measured by the same rules, and is subject to the same limitations, as the right of the tenant himself. This rule will be applied as to the ser-

7 D. & R. 117; *Collins v. Barrow*, 1 M. & R. 112; *Salisbury v. Marshall*, 4 C. & P. 65; *Cowie v. Goodwin*, 9 C. & P. 378; *Gilhooley v. Washington*, 4 N. Y. 217; but see *contra* and expressing the general rule, *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 M. & W. 68; *Chappell v. Gregory*, 34 Beav. 250; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Cleves v. Willoughby*, 7 Hill, 83; *Dutton v. Gerrish*, 9 Cush. 89; *Royce v. Guggenheim*, 106 Mass. 202; *Elliot v. Aiken*, 45 N. H. 36. The Civil Code of California, § 1941, provides that the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it in a condition fit for occupation, and repair all subsequent dilapidations which render it untenable. See *Wilson v. Treadwell*, 81 Cal. 58.

¹ See *Taylor, Landlord & Tenant*, 8th ed., §§ 175 *n.*, 327, 328, 382, and cases cited; *Wilson v. Finch Hatton*, L. R. 2 Exch. 236; *Bowe v. Hunking*, 135 Mass. 380; *Booth v. Merriam*, 155 Mass. 521; *Moynihan v. Allen*, 162 Mass. 270; *Eakin v. Brown*, 1 E. D. Smith, 36.

² *Jaffe v. Hartean*, 56 N. Y. 398; *Freeman v. Hunnewell*, 163 Mass. 210; *Taylor, Landlord & Tenant*, 8th ed., § 175 *a*, notes and cases cited.

³ *Peterson v. Smart*, 70 Mo. 34. It has been hold that the landlord was liable to the tenant for injuries resulting from failure to repair. See *Johnson v. Dixon*, 1 Daly, 298; *Eagle v. Swayze*, 2 Daly, 140. But these cases are not law, and the former case was overruled in *Arnold v. Clark*, 45 N. Y. S. C. 252.

vant, employee, or customer of the tenant. Thus, where the employee of the tenant of a store, knowing that he was forbidden by posted notices to pass up and down on the freight elevator therein, did so pass and was thereby injured, it was held that he could not recover for his injuries as against the owner of the building; and this although it was customary for his fellow-employees so to use the elevator; since the owner had no notice that the elevator was used except for merchandise.¹ And the ordinary liability of the landlord to his tenant does not subsist as to a subtenant, when the occupancy is without the assent of the landlord, express or implied.²

§ 84. **Owner liable for the Results of Fraudulent Concealment.** — If however the landlord is guilty of misrepresentation or wilful concealment as to defects or dangers upon the premises which the tenant cannot detect upon a fair inspection, and such defects or dangers cause injury to the tenant, the landlord will be legally responsible for injuries caused thereby. So the landlord was held liable for damages resulting to the tenant from defective drains, the condition of which he had not fairly stated to the tenant before the contract of letting was made.³ Where the defendant being the owner of a tenement house knew that it was so infected by the small-pox as to be unfit for occupation, and to endanger the health or lives of its occupants, and concealed this knowledge from the plaintiff in order to induce him to hire the tenement, and so leased it to the plaintiff, and the plaintiff entered into occupation, and with his children took the disease, the defendant was held to be guilty of actionable negligence, and liable for whatever injury the plaintiff sustained by reason thereof.⁴ So where

¹ *McCarthy v. Foster*, 156 Mass. 511.

² *Cleves v. Willoughby*, 7 Hill, 83; *Jaffe v. Hartean*, 56 N. Y. 398; *O'Brien v. Capwell*, 59 Barb. 497; *Donaldson v. Wilson*, 60 Mich. 86; *Hazlett v. Powell*, 30 Penn. St. 293; *Nelson v. Liverpool Brewing Co.*, L. R. 2 C. P. D. 311; *Hart v. Windsor*, 12 M. & W. 68; *Keates v. Cadigan*, 10 C. B. 591; *Robbins v. Jones*, 15 C. B. (N. S.) 221.

³ *Wilson v. Finch Hatton*, L. R. 2 Exch. 236. See *Scott v. Simons*, 54 N. H. 426; *Scanalzreid v. White*, 97 Tenn. 36.

⁴ *Minor v. Sharon*, 112 Mass. 477; *Cowen v. Sunderland*, 145 Mass.

the owner of a wharf lets it, knowing, or in position to know, that it is dangerously defective, he may be liable for an injury occurring by reason of such defect to an employee of the tenant engaged on the wharf about the tenant's business and in the exercise of due care.¹ It is the general rule that, in order to hold the landlord responsible for injuries resulting from the existence of concealed defects in the premises, it must appear that he knew of the existence of them and wilfully concealed this from the tenant; or at least that they were of such a character that the landlord could not have been ignorant of their existence unless he had been grossly negligent.² But it seems to have been considered in Massachusetts that in order to a recovery by the tenant it is not necessary to show that the landlord had actual knowledge of the defect, it being his duty to exercise due care to keep the premises in proper condition for occupation.³

§ 85. **Or for Injuries on Part of the Premises of which he retains the Control.** — When the landlord retains possession or control of a part of premises the rest of which are under lease,

363. See, also, *Cesar v. Karutz*, 60 N. Y. 229, in which the facts were otherwise similar, but it did not appear that there was any intentional concealment on the landlord's part, and the decision rested upon the non-performance by the defendant of his duty to inform the tenant of the danger. A tenant may rely on the declarations of the landlord that there is no infectious disease on the premises, and is not put upon further inquiry. *Snyder v. Gordon*, 46 Hun, 538. Where a well on the demised premises was polluted by the carcass of a dead dog, and the tenant in possession complained to the landlord of the bad quality of the water, and the landlord made an examination of the well and discovered the carcass, but concealed the discovery from the tenant, he was held liable for the injury caused to the tenant's family by the polluted water. *Maywood v. Logan*, 78 Mich. 135.

¹ *Wendell v. Baxter*, 12 Gray, 494.

² See cases cited *supra*, and also *Blake v. Ranous*, 25 Ill. App. 486.

³ *Lindsey v. Leighton*, 150 Mass. 285. In this case it was held further that where the tenant received injury by reason of the defective condition of the leased premises, and it appeared that the title of the premises was in the defendant's wife, but that the defendant assumed to be the owner, and conducted himself as such, both before and after the accident, and, as such made the contract of letting with the plaintiff, he could not escape liability by showing want of title.

his liability for injuries suffered by his tenant by reason of defects or dangers in the premises will depend on the character of his possession, as being joint with the tenant, or exclusive; and on the degree of the control which he exercises. If such control or possession be exclusive on his part, he may be liable to the tenant as to a third person.¹ Thus, a landlord of rooms in a building is liable for injuries resulting to one of his tenants by reason of defects in the common staircase arising from his failure to use reasonable care in keeping the staircase in repair.² For the rule that the landlord does not warrant the condition of the tenement does not apply to parts of the premises of which he retains exclusive control.³ It has been held, however, that there is no obligation on the part of the landlord to reconstruct the ways or passages on a different plan, if these, as they existed at the time of the letting, were not altogether safe and convenient by reason of some fault in the original plan, which fault the tenant knew or which was apparent on inspection.⁴ So if the defect alleged be only a contributing cause of the injury, the proximate cause being something for which the lessor is not responsible, the latter is not responsible; as where ice and snow accumulated upon a stairway, alleged to be of improper construction, and the tenant slipped thereon and was injured.⁵ Nor will the lessor be responsible for a defect if the tenant has free access to it and the means of remedying it, or if he entered upon the premises with actual or implied notice of its existence.⁶

¹ *Tenant v. Goldwin*, 2 Ld. Raymond, 1019; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Dunn v. Birmingham Coal Co.*, L. R. 7 Q. B. 244; *Robbins v. Mount*, 4 Rob. (N. Y.) 553; *Taylor v. Bailey*, 74 Ill. 178; *Ward v. Fagan*, 28 Mo. App. 116. See *Dollard v. Roberts*, 28 N. Y. S. Rep. (1890) 569.

² *Donohue v. Kendall*, 50 N. Y. S. C. 386; *Looney v. McLean*, 129 Mass. 33; *Leydecker v. Brintnall*, 158 Mass. 292; *Wilcox v. Zane*, 167 Mass. 302; *Robbins v. Atkins*, 168 Mass. 45; *Victory v. Foran*, 56 N. Y. S. C. 507; *Sawyer v. McGillicuddy*, 81 Maine, 518.

³ *Toole v. Beckett*, 67 Maine, 544, but see *Purcell v. English*, 86 Ind. 34.

⁴ *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357; *Quinn v. Perham*, 151 Mass. 162.

⁵ *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357.

⁶ See § 84, and cases cited, *supra*.

§ 86. Owner undertaking Repairs liable for Negligence therein.

— Although a landlord is not under obligation to make repairs upon the leased premises, unless a stipulation for such repairs is a part of the contract between the parties, yet if he undertake to make repairs, although gratuitously, he is bound to the exercise of ordinary care and skill in carrying them out, and, if he fail in this and thereby injury result to his tenant, he will be liable therefor.¹ For it is a familiar rule that an action may be maintained for an injury occasioned by want of due care and skill in doing what the defendant promised to do, although there was no consideration for the promise.² Upon this subject it was said: "It is argued, that upon a gratuitous undertaking of this nature the defendant could only be held responsible for bad faith or for gross negligence. . . . But in assuming to make the repairs . . . he must be considered as professing to have the requisite skill, . . . and as undertaking to select and furnish the kind and quality of materials appropriate to the accomplishment of the desired object. . . . The true question . . . was whether the defendant had discharged the duty which he had assumed, with that due regard to the rights of the other party which might reasonably have been expected of him under all the circumstances. His undertaking required the skill . . . of an ordinary mechanic, and his failure to furnish it, either because he did not possess, or neglected to use it, would be gross negligence."³

§ 87. Or for his Overt Acts of Negligence. — While the landlord is not bound to remove obstructions, upon a part of the premises wholly or partly within his control, which arise from the operation of natural causes, or the acts of strangers, and are not in the nature of defects in the premises themselves, he

¹ *Gill v. Middleton*, 105 Mass. 477; *Hine v. Cushing*, 53 Hun, 319; *Little v. Macadaras*, 38 Mo. App. 187; *Gregor v. Cady*, 82 Maine, 131; *Regina v. Watts*, 1 Salk. 137; *Russell v. Shenton*, 3 Q. B. 449.

² See *Benden v. Manning*, 2 N. H. 289, 291; *Thorn v. Deas*, 4 Johns 84; *Elsee v. Gatward*, 5 T. R. 143; *Slater v. Barker*, 2 Wils. 389; *Coggs v. Bernard*, Com. Rep. 133; *Riley v. Lissner*, 160 Mass. 330.

³ *Gill v. Middleton*, 105 Mass. 477, and see *Steamboat New World v. King*, 16 How. 469.

will always be liable to his tenant for injuries arising from obstructions caused by his own active negligence. Thus it is said that the landlord might be responsible for negligently leaving a coal scuttle in a dangerous position in a passageway used by his tenant, but not for failing to remove one so placed by another person. Upon this principle, a landlord who let tenements in a building to different tenants with a right of way in common over an uncovered piazza annexed to the building and extending its whole length and over steps leading from the end of the piazza to the street, was held to be liable for an injury received by the tenant from falling upon ice accumulated on the piazza and steps, by reason of water flowing thereon from a defective pipe connecting with the roof of the building.¹

§ 88. **Violation of Statute Regulation by the Owner, Effect of.**—When the statute imposes some special duty upon the landlord in respect to maintaining the leased premises in a safe condition, as to provide suitable means of escape therefrom in the case of fire, a tenant in occupation may sue for the breach of such duty which has caused him an injury, and his occupancy of the premises for a reasonable time after discovering the absence of such suitable means within which time he may notify the landlord of such absence, will not deprive him of his remedy under the statute. This is upon the general principle that when the statute imposes a duty, any person having an interest in the performance of that duty may sue for an injury caused by a breach thereof. And where injury results from the violation by the defendant of a statutory duty, this is proof, and, in the absence of contributing causes, conclusive proof, of the defendant's negligence.² But if the vio-

¹ *Watkins v. Goodall*, 138 Mass. 533. This case is distinguished from that of *Woods v. Naumkeag Cotton Co.*, 134 Mass. 357, see § 85, *ante*, in that, in the latter case, the accumulation of snow and ice was due to the operation of natural causes, and not, as here, to a defect in construction for which the landlord was liable. See *Alger v. Kennedy*, 49 N. Y. 109; *Totten v. Phillips*, 52 N. Y. 254; *Kimmell v. Burfeind*, 2 Daly, 155; *Worthington v. Parker*, 11 Daly, 545; *Alston v. Grant*, 3 El. & Bl. 128.

² *Willy v. Mulledy*, 78 N. Y. 310; *Hover v. Barkhoff*, 44 N. Y. 113; *Heeney v. Sprague*, 11 R. I. 456. When, by the terms of the act, it is to

lation of the statute is not the proximate cause of the injury complained of, the weight of authority is in favor of the rule that the defendant is not, by the mere fact of the occurrence of the injury, necessarily made liable therefor.¹

(b) *To Third Persons.*

§ 89. **Generally: Landlord liable for Nuisance permitted.**— Although the premises be leased and in the occupation of the tenant, yet the landlord may be liable to third persons for injuries resulting from the faulty or defective construction of the building or the appurtenances thereto.² And this liability may subsist although the plaintiff entered the premises at the invitation of the tenant.³ So the landlord may be liable if the injuries result from the ruinous condition of the premises at the time of the letting.⁴ But it is clear that this liability can subsist, when it is not created by the terms of an express contract, only when there has been some misfeasance on the part of the landlord. It is said: "We think there are only two ways in which landlords or owners can be made liable in the case of injury to a stranger by the defective repairs of premises let to a tenant, the occupier, and the occupier alone, being *prima facie* liable: first, in the case of a contract by the landlord to do repairs when the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, when he lets the premises in a ruinous condition. In either of these cases we think an action would lie against the owner."⁵ Thus the landlord may be liable for be accepted by the town or city before taking effect, the fact of the acceptance is to be proved before the defendant can be charged with liability under the act. *Handyside v. Powers*, 145 Mass. 123.

¹ See §§ 111, 111 *a*, *post*, and cases cited.

² See *Swords v. Edgar*, 59 N. Y. 28; *Wenzler v. McCotter*, 22 Hun, 60; *Picard v. Collins*, 23 Barb. 444; *Durant v. Palmer*, 5 Dutch. 544; *Reading v. Reiner*, 167 Penn. St. 41; *Scott v. Simons*, 54 N. H. 426; *King v. Pedley*, 1 Ad. & El. 827.

³ *Learoyd v. Godfrey*, 138 Mass. 315.

⁴ See *Bellows v. Sackett*, 15 Barb. 96; *Moody v. Mayor*, 43 Barb. 482; *Eakin v. Brown*, 1 E. D. Smith, 642; *Peoria v. Simpson*, 110 Ill. 294; *Reichenbacher v. Palmeyer*, 8 Bradw. (Ill.) 217; *Marshal v. Head*, 59 Tex. 266.

⁵ *Nelson v. Liverpool Brewing Co.*, L. R. 2 C. P. D. 311.

the existence of a nuisance on the premises, when, and not otherwise, he is responsible for its existence, or when it exists upon a part of the premises of which he has the control.¹ As between the landlord and tenant, the latter is presumptively liable for a nuisance on the premises unless the lease contemplates its continuance, in which case both landlord and tenant will be liable.² And if the landlord renews a lease, or grants a new lease, while a nuisance on the premises continues, he may be liable for any injury to third persons occurring by reason of the nuisance.³ If the nuisance is pro-

¹ But the owner may be liable for injuries to persons having lawful occasion to use a building, such injuries being caused by a defect, as an opening, in the sidewalk, in front of the building, left there in the construction of the building, although the building itself is in the occupation of a tenant. *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Tomle v. Hampton*, 28 Ill. App. 142, 129 Ill. 379. See *Davis v. Michigan Bell Telephone Co.*, 61 Mich. 307.

² Per Cooley, J., in *Samuelson v. Cleveland Iron Mining Co.*, 49 Mich. 164, and see *Irvine v. Wood*, 51 N. Y. 224; *Swords v. Edgar*, 59 N. Y. 28; *Smith v. Elliott*, 9 Penn. St. 345; *Pillsbury v. Moore*, 44 Maine, 154; *McDonough v. Gilman*, 3 Allen, 264; *Helwig v. Jordan*, 53 Ind. 21; *Grady v. Wolsner*, 46 Ala. 381; *Todd v. Flight*, 9 C. B. (N. S.) 377; *Kirby v. Boylston Market Ass'n*, 14 Gray, 249.

³ See *Taylor, Landlord & Tenant*, 8th ed. § 175 n. 2, and cases cited; *Kalis v. Shattuck*, 69 Cal. 593. "If a nuisance is created during a term already existing, no liability falls on the landlord pending that term, for the reason that he has no legal means of abating the nuisance. He cannot enter upon his tenant's possession for that purpose, and would be a trespasser if he did so. But when the term expires, his right of entry and power to abate at once arise, and for that reason a liability commences. If he declines to re-enter and abate the nuisance, and relets the premises, the liability which arose at the termination of the term will be neither discharged nor evaded." *Rankin v. Ingwersen*, 42 N. J. L. 481. See also *Rex v. Pedley*, 5 Ad. & El. 822; *Rich v. Basterfield*, 4 C. B. 782; *Clancy v. Byrne*, 56 N. Y. 129. A landlord has been held liable for the existence of a nuisance on the leased premises where the tenancy was from year to year and so terminable by notice, which the landlord failed to give. *Gandy v. Jubber*, 5 Best & Smith, 87. Where the defendant came into possession, in fee, of a wharf, subject to an outstanding lease, which wharf was defective and out of repair when the lease was executed, it was held that without notice of the condition of the wharf the defendant was not liable to a third person injured thereby, although the lease gave the lessors the right to enter to make repairs at their option, but did not bind them to do so. *Ahern v. Steele*, 115 N. Y. 203.

duced only by the act of the tenant, he only is responsible therefor.¹

§ 90. **Liability of Landlord dependent on Degree of Control he exercises.** — It is obvious that if the landlord assumes and exercises entire control of the premises he will be liable to third parties for injuries received thereon in the same manner as he would be were there no lease subsisting.² But there often arise difficult questions of fact in determining whether the accident occurred upon a part of the premises which remained under the control of the landlord or the control of which he had assumed. Thus it was held that under a contract with reference to a public market, by which the sole right conveyed by the city to a third person is the right to collect and appropriate the market revenues, the market remaining subject to all the regulations, control, and authority of the city, applicable to every other market, the market remains the premises of the city, and not of the lessee, and the latter does not incur the obligations of a tenant to keep the premises safe for those lawfully entering thereon.³ It is held that the owner of a building who lets it in flats, hires a janitor to take care of it,

¹ See cases cited *supra*, and also *Ditchett v. South Division R. R.*, 67 N. Y. 425; *Ryan v. Wilson*, 87 N. Y. 471, 63 How. Pr. 172; *Norton v. Wiswall*, 26 Barb. 618; *Heimstreet v. Howland*, 5 Denio, 68; *Felton v. Daall*, 22 Vt. 170; *Owings v. Jones*, 9 Md. 108; *Fisher v. Thirkell*, 21 Mich. 1; *Harris v. Cohen*, 50 Mich. 324; *Mahoney v. Atlantic & S. L. R.*, 63 Maine, 68. It has been held that the landlord was liable for injuries caused by the existence of a nuisance on the premises although it only became active by the tenant's ordinary use of the premises; as where the plaintiff was injured by reason of his horse taking fright at the sails of a windmill on the premises, worked by the tenant. *House v. Metcalf*, 27 Conn. 631. In this case the landlord's liability was made to rest upon the ground of the tenant's agency. A landlord was held liable to a third party for injuries caused by the fall of an awning by reason of its being insecurely attached to the premises, he having consented to its erection by his lessee and furnished a part of the material therefor. *Riley v. Simpson, Catts v. Simpson*, 83 Cal. 217. But a tenant who receives a benefit, as part of the leased premises, of an awning illegally maintained over the sidewalk, maintains a nuisance, and is liable to one injured thereby. *McParthand v. Thoms*, 24 N. Y. S. Rep. 110 (1889).

² *Leslie v. Pound*, 4 Taunt. 649; *Cannavan v. Conkling*, 1 Daly, 509.

³ *Weymouth v. New Orleans*, 40 La. Ann. 344.

and retains some control of it, is responsible for an injury occasioned by the janitor's leaving a coal-hole in the sidewalk open and unguarded, to take in coal, although the coal was for the use of tenants.¹ So the owner of a building who retains control of the entrance to the basement, and erects guards around it, and employs a watchman to look after the safety of the whole building, is responsible for an injury caused by a faulty projection of such basement entrance.² And so is the owner of a place of public entertainment which he has temporarily leased to another, for injuries occurring by reason of the unsafe condition of the approaches thereto.³ On the other hand, the owner of a building is not liable for injuries caused by the fall of snow from the roof of a building into the highway, when the whole building is leased to a tenant, and it does not appear that the latter might not have cleared the roof had he used due care, or that he could not, by proper precaution, have prevented the accident; there being no covenant by either party to repair, and the landlord reserving the right to enter to repair.⁴ But the rule will be otherwise where the roof of the building remains in the control of the owner, who leases apartments therein to different occupants.⁵ In order to charge the landlord, it must appear that he was in active, and, it would seem, in exclusive control of that part of the premises, or the approaches thereto, where the accident occurs. Thus the landlord was held liable for injuries resulting to third persons from defects in a way leading to several tenements leased to several tenants, and used in common by the tenants and the public, there being no agreement on the part of the tenants to keep the way in repair.⁶ And a like rule of liability has been applied in the case of accidents occurring by reason of defective or open

¹ *Jennings v. Van Schaick*, 108 N. Y. 530.

² *Wasson v. Pettit*, 49 Hun, 166; *Brunker v. Cummins*, 133 Ind. 443.

³ *Oxford v. Leathe*, 165 Mass. 254.

⁴ *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, and see *Leonard v. Storer*, 115 Mass. 86; *Lee v. McLaughlin*, 86 Maine, 410.

⁵ *Shiple v. Fifty Associates*, 101 Mass. 251; *Shepard v. Creamer*, 160 Mass. 496.

⁶ *Readman v. Conway*, 126 Mass. 374; *O'Sullivan v. Norwood*, 14 Daly, 286.

traps in passages or entries used in common by different tenants of a building, as against the owner of the building.¹ But where a walk, rendered dangerous by the lack of a railing, was used by one tenant and the persons whom he invited to the building, and there was no evidence that the landlord retained any control over the walk, the landlord was held not to be liable to a third person, going to see the tenant on business, for an injury received in falling from the walk.² Where an elevator on the leased premises was run by the tenant's servant, but was to be kept in repair by the landlord, it was held that the tenant was not in such possession or control of the elevator as to make him responsible for an accident occurring to a third person from a defect in the construction of the elevator.³ If the tenant assumes the duty of repairing a defect, he is liable for a resulting injury, although the landlord has paid for the repairs.⁴

¹ *Elliott v. Pray*, 10 Allen, 378. See *Chapman v. Rothwell*, El. Bl. & El. 168.

² *Mellen v. Morrill*, 126 Mass. 545. See *Mistler v. O'Grady*, 132 Mass. 139.

³ *Sinton v. Butler*, 40 Ohio St. 158, and see *Fisher v. Jansen*, 30 Ill. App. 91, 128 Ill. 549; *Stuart v. Harvard College*, 12 Allen, 58.

⁴ *Sterger v. Van Sicklen*, 7 N. Y., Sup. N. E. Rep. 805 (1890).

CHAPTER III.

OF NEGLIGENCE GENERALLY AND THE DOCTRINE OF
PROXIMATE CAUSE.

SECTION I.

OF NEGLIGENCE, GENERALLY.

§ 91. *Defined.*—Negligence, whether on the part of the plaintiff or of the defendant, may be defined as the want of ordinary or reasonable care in respect of that which it is the duty of the party to do or to leave undone. The expression “wilful” negligence which is sometimes used involves, obviously, a contradiction in terms, for negligence and wilfulness are incompatible, since the former arises from inattention, and the latter from design.¹ By the words “ordinary” or “reasonable” care, is intended such care as men of ordinary sense, prudence, or capacity would take, under like circumstances, in the conduct or management of their own affairs.² The degree of care to be required in different cases varies

¹ *Parker v. Penn. Co.*, 134 Ind. 673; *Fisher v. Louisville, &c. R. R.*, 146 Md. 558; *Kentucky Central R. R. v. Gastineau*, 83 Ky. 119; *Louisville & N. R. R. v. Long*, 94 Ky. 410. See *Avery v. Meek*, 96 Ky. 192; *Cincinnati R. R. v. Palmer*, 98 Ky. 382; *Highland Ave., &c. R. R. v. Swope*, 115 Ala. 287. But see *Louisville & N. R. R. v. Markee*, 103 Ala. 160, as cited *post*, § 92; *Kansas City, &c. R. R. v. Lackey*, 114 Ala. 152. It is held that a provision of statute prohibiting the making of “flying switches” in a municipality and providing that “mere contributory negligence” shall not be a defence to an action for injuries resulting therefrom, was not intended to recognize degrees of contributory negligence; and that wantonly reckless conduct contributing to the injury is not within the statute. *Pulliam v. Ill. Cent. R. R.*, 75 Miss. 627.

² *Shaw v. Boston & Worcester R. R.*, 8 Gray, 45, 79.

according to the situation of the parties and the exigencies which require vigilance and attention;¹ and is higher in circumstances which place life and limb in jeopardy than in other cases.² So the measure of care to which a particular person is bound depends upon his capacity to understand the circumstances in which he is placed and the dangers justly to be apprehended therefrom. It is to be observed, in cases in which negligence is the gist of an action at law, that the words "due," "ordinary," or "reasonable" care have exactly the same meaning, whether applied to the conduct of the plaintiff or of the defendant, for the law does not prescribe a different rule or measure of care in the respective parties.³ Generally, if the neglect of the defendant be the proximate cause of the injury complained of, it is not material whether such neglect be by omission or commission.⁴ But it is to be observed that, in some cases, the omission of the defendant to do a certain thing may be negligent, and in another set of circumstances excusable. Thus the owner of land may, as to persons entering upon his premises by his procurement, be bound to fence or guard an excavation in the way leading to the premises, while as to one entering as a trespasser or intruder, he would not be so responsible.⁵ So it is held to be negligence to explode a blast in a thickly settled part of a city, although the person so doing use the highest degree of skill and care.⁶ It has been held that the mere violation of a duty imposed by law is negligence, *per se*,⁷ but the weight of reason and authority limits the rule to cases in which such

¹ *Fletcher v. Boston & Maine R. R.*, 1 Allen, 9; *Brown v. Kendall*, 6 Cush. 292.

² *Cayzer v. Taylor*, 10 Gray, 274.

³ *Shaw v. Boston & Worcester R. R.*, 8 Gray, 45, 79.

⁴ *Davis v. Chicago & Northwestern R. R.*, 58 Wis. 646; *Harriman v. Pittsburg, C. & St. L. R. R.*, 45 Ohio St. 11; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391.

⁵ See §§ 71 *et seq.*

⁶ *Munro v. Pacific Coast Dredging & Reclamation Co.*, 84 Cal. 515; *Colton v. Onderdonk*, 69 Cal. 155; *Hay v. Cohoes Co.*, 2 N. Y. 159.

⁷ *Texas & Pac. R. R. v. Brown*, 11 Tex. Civ. App. 503; *Gulf, Col. & Santa Fe R. R. v. Pendery* 14 Tex. Civ. App. 60; *Wolff Mfg. Co. v. Wilson*, 152 Ill. 9; *Clements v. Louisiana Gas & El. Co.*, 44 La. Ann. 692.

violation is the proximate cause of the injury complained of.¹ But the fact of violation is always admissible, as evidence, upon the issue of negligence, as to acts which the statute prohibits.²

§ 92. **No Degrees of.** — Although, for the sake of convenience, it is often said, as to suits brought to recover for personal injuries, that, in order to a recovery, there must appear negligence on the part of the defendant and due care on the part of the plaintiff, yet it might with equal propriety be said that the plaintiff is bound to show that he was not negligent, and that the defendant did not exercise due care. It follows that there cannot be, legally speaking, degrees of negligence on the part of the defendant any more than there can be degrees of due care on the part of the plaintiff; for, in respect of the same transaction, the presence of the one element of conduct implies the absence of the other.³ Any negligence which is legally sufficient to charge the defendant with liability is, in a sense, gross negligence; and the question whether the defendant is to be charged with it, as being a question of fact, must depend upon the circumstances of the case; as must also the question whether the plaintiff was in the exercise of due care, or in other words not guilty of contributory negligence. It is said: "The words 'gross,' 'reckless,' and 'wanton' do not imply the same thing as 'wilful' or 'intentional,'

¹ See §§ 98, 100, 112, *post*, and cases cited; *Borck v. Mich. Bolt & Nut Works*, 111 Mich. 129.

² See § 112, *post*.

³ So, in Illinois, where the doctrine of "Comparative Negligence" formerly obtained, see § 102, *post*, and the courts recognized a legal distinction in degrees of negligence, it was said that "gross negligence" and "the want of slight care" are convertible terms. *Chicago & Northwestern R. R. v. Chapman*, 30 Ill. App. 504. So it was held that an instruction defining the absence of gross negligence as "conduct not wanting in reasonable care and prudence, in view of all the circumstances and surroundings of the injury," was correct. *Barnum v. Terpenning*, 75 Mich. 557. In *McAdoo v. Richmond & D. R. R.*, 105 N. C. 140, it was said that, in an allegation of "gross" negligence, the term "gross" was to be taken as a mere expletive. But in *Jung v. Stevens Point*, 74 Wis. 547, it was held to be the duty of the court to instruct the jury, particularly, as to what degree of negligence on the part of the plaintiff would defeat his action.

but mean less than wilfulness and nothing more than negligence.”¹ Thus the “degrees” of negligence often spoken of do not admit of such precision and exactness of definition as to be of practical use without a statement of the circumstances which they are intended to designate. And it is obvious that that conduct which may be negligent in one condition of circumstances may be prudent in another.²

¹ *Cleveland, C., C. & St. L. R. R. v. Phillips*, 24 U. S. App. 489. See, also, *Albion Lumber Co. v. DeNobra*, 44 U. S. App. 347; *Gould v. Schermer*, 101 Iowa, 582; *Omaha Street Railway v. Craig*, 39 Neb. 601; *Culbertson v. Holiday*, 50 Neb. 229; *Central R. R. v. Brantley*, 93 Ga. 259. But in Alabama degrees of negligence as “simple,” “reckless,” or “wilful” are recognized in a late case, which overrules many former decisions. *Louisville & N. R. R. v. Marker*, 103 Ala. 160. See, also, *Sabine & E. Texas R. R. v. Hanks*, 2 Tex. Civ. App. 306.

² As to the so called “degrees” of negligence, *Curtis, J.*, says: “It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances; to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms ‘gross negligence’ or ‘ordinary negligence’ which can be applied to practice, but leaves it to the jury to determine in each case what the duty was and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.” *The New World v. King*, 16 How. 474, approved in *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U. S. 409. In the latter case it was contended that where “gross” negligence appeared the case might justify the assessment of exemplary damages. See *Wilson v. Brett*, 11 M. & W. 113; *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 600; *Hinton v. Dibbin*, 2 Q. B. (N. S.) 661. It is said, by *Shaw, C. J.*: “The terms ‘slight negligence,’ ‘want of ordinary care,’ and ‘gross negligence’ are useful in their way, but they are not precise and exact enough, without a statement of the facts designated by them, to enable a court to judge of the rights of parties thereby affected.” *Chandler v. Worcester Mutual Life Insurance Co.*, 3 Cush. 328, 331. See *Galbraith v. West End Street Railway*, 165 Mass. 572. The court in New Hampshire says: “The distinction between negligence and gross negligence, carelessness and gross carelessness, is to a great extent merely verbal. But indictments and declarations founded on special statutes should follow the forms of such statutes, and should use the same words and in the same sense as the statute uses them.” *State v.*

§ 93. **Law and Fact.** — The better opinion appears to be that when upon a consideration of the facts the question whether the party was negligent is fairly doubtful, the case presents a mixed question of law and fact; it being always the duty of the court to instruct the jury as to what will constitute negligence, and the duty of the jury, under such instruction, to ascertain whether the party was in fact negligent, since where the duty imposed is merely to take such precautions as a reasonable man of ordinary prudence would take under like circumstances, both the measure of duty and the extent of its performance are questions of fact.¹ Some cases hold that when the facts are in dispute the question is one of fact, otherwise one of law;² but these technical differences of definition are perhaps not important, since the authorities, with few exceptions, are agreed that when the conclusion to be drawn from the facts is fairly debatable, or rests in doubt, negligence is, finally, a conclusion of fact to be drawn by the jury from the testimony in the case, under proper instructions from the court.³ It is to be observed that like rules upon this subject

Manchester & Lawrence Railroad, 52 N. H. 528. See *Gill v. Middleton*, 105 Mass. 474. It is said in New York: "What will amount to gross negligence depends upon the special circumstances of each case." Per Selden, J., in *Nolton v. Western R. R.*, 15 N. Y. 444, 449, and see *Wilds v. Hudson River R. R.*, 24 N. Y. 430; *Beal v. South Devon Railway*, 3 H. & C. 337, 341.

¹ *Trow v. Vermont Central R. R.*, 24 Vt. 487; *Briggs v. Taylor*, 28 Vt. 180; *Wright v. Malden & Melrose R. R.*, 4 Allen, 289; *Norris v. Litchfield*, 35 N. H. 271; *Nolan v. New York, N. H. & H. R. R.*, 53 Conn. 461; *Northern Pacific R. R. v. Austin*, 24 U. S. App. 336; *Benson v. Central Pac. R. R.*, 98 Cal. 45; *Davis v. California St. Cable R. R.*, 105 Cal. 131; but see *Fiske v. Forsyth Dyeing, &c. Co.*, 57 Conn. 118; *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24. Whether a given state of facts constitutes negligence is generally a question of law; but whether a particular act of negligence contributed to the injury is a question of fact. See *Catawassa R. R. v. Armstrong*, 52 Penn. St. 282.

² *State v. Manchester & Lawrence R. R.*, 52 N. H. 528; *Warren v. Balt. & Ohio R. R.*, 168 U. S. 339.

³ *Vinton v. Schwab*, 32 Vt. 612; *Williams v. Clinton*, 28 Conn. 264; *State v. Iowa Central R. R.*, 43 Iowa, 109; *Farley v. Chicago, R. I. & Pac. R. R.*, 56 Iowa, 337; *Burns v. Chicago, Minneapolis & St. P. R. R.*, 69 Iowa, 450; *Thompson v. New York Central & H. R. R. R.*, 110 N. Y. 636; *Blaiser v. New York, L. E. & Western R. R.*, 110 N. Y. 638; *Roll v. Northern Central R. R.*, 15 Hun, 496; *Hunter v. Wanamaker*, 2 Cent.

are to be applied whether the alleged negligence in issue be that of the plaintiff or of the defendant.¹

§ 94. **Functions of Court and Jury.** — When there is no evidence of the defendant's negligence to sustain the plaintiff's action the court is bound so to instruct the jury and to direct a verdict for the defendant, or nonsuit the plaintiff.² But if there be any evidence of negligence, amounting to more than a mere scintilla, the question is to be submitted to the jury.³ A scintilla of evidence is not sufficient to support an action,⁴ and the rule is said to be that the issue should be submitted (1) when the facts which if true would be evidence of negligence are controverted;⁵ (2) where such facts are not disputed, but there might be a fair difference of opinion as to

Rep. (Pa. 1886) 270; *Central Branch Union Pac. R. R. v. Nathan*, 22 Kan. 41; *Central Branch Union Pac. R. R. v. Henigh*, 23 Kan. 347; *Baltimore & Potomac R. R. v. Jones*, 95 U. S. 439. It is the duty of the court to instruct whether or not a given state of facts would, upon the pleadings, constitute negligence. *Ravenscraft v. Missouri Pac. R. R.*, 27 Mo. App. 617. In *Denham v. Trinity County Lumber Co.*, 73 Tex. 78, it was held that it was error to instruct the jury that certain facts, if proved, constituted contributory negligence; the question being for the jury upon the facts of the case. See, also, *Brown v. Sullivan*, 71 Tex. 470, and cases cited *post*, § 111.

¹ *Bridge v. Grand Junction Railway*, 3 M. & W. 246; *Davies v. Mann*, 10 M. & W. 546; *Sweat v. Boston & Albany R. R.*, 156 Mass. 284.

² *Weightman v. Washington*, 66 U. S. 39; *St. Louis & San Francisco R. R. v. Schumacher*, 152 U. S. 77; *Northern Pacific R. R. v. Everett*, 152 U. S. 107; *Southern Pacific R. R. v. Pool*, 160 U. S. 438; *Texas & Pacific R. R. v. Gentry*, 163 U. S. 353; *Barnhart v. Chic., M. & St. P. R. R.*, 97 Iowa, 654; *Ill. Cent. R. R. v. Larson*, 152 Ill. 326; *Wade v. Columbia El. Co.*, 51 S. C. 296; *Chic., B. & Q. R. R. v. Landauer*, 36 Neb. 642; *Am. Water Works Co. v. Dougherty*, 37 Neb. 373.

³ *Carver v. Detroit & S. Plank Road Co.*, 61 Mich. 584; *Pennsylvania R. R. v. Horst*, 110 Penn. St. 226; *Wight Fire-Proofing Co. v. Roczkai*, 30 Ill. App. 266, 130 Ill. 139; *Lake Shore & M. S. R. R. v. Ouska*, 151 Ill. 232; *Elwell v. Hacker*, 86 Maine, 400; *Haggerty v. Granite Co.*, 89 Maine, 118; *Doyle v. West End St. Railway*, 161 Mass. 533; *Salladay v. Dodgeville*, 85 Wis. 318.

⁴ But see *Central R. R. v. Rouse*, 77 Ga. 393; *Patton v. Southern R. R.*, 42 U. S. App. 567.

⁵ *Hoag v. Lake Shore & Mich. Southern R. R.*, 85 Penn. St. 293; *King v. Thompson*, 87 Penn. St. 365; *Walton v. Ackerman*, 49 N. J. L. 234.

whether the inference of negligence ought to be drawn; (3) when the facts are in dispute and the inferences to be drawn from them are doubtful. When no fair inference of negligence can be drawn from evidence favorable to the plaintiff, assuming that such evidence is true, the issue should be withdrawn from the jury.¹ So upon the question of contributory negligence, when the whole testimony, with all the fair inferences to be drawn therefrom, show that the plaintiff was negligent, the question is for the court.² But although the facts be undisputed, yet if fair-minded persons may arrive at different conclusions thereon,³ or if the evidence is conflicting, the matter is for the jury.⁴ It is held in the Federal courts that, when the facts furnish conclusive proof of negligence, this may be regarded as properly to be found among the conclusions of law as a legal inference from the facts.⁵ Like rules apply when the negligence of both parties is in issue.⁶

§ 95. *Infant may be guilty of.* — The authorities, generally, hold that negligence may be imputed to an infant plaintiff, when his act which produced the injury was one which the general judgment of common men would immediately condemn as negligent in a person of his age and capacity; and when there were no circumstances attending the act to indicate that the plaintiff used ordinary care;⁷ as where a boy of

¹ *Hathaway v. East Tennessee, V. & G. R. R.*, 29 Fed. Rep. 489; *Cadwell v. Arnheim*, 152 N. Y. 182. In Texas, the law declines to decide the question of negligence generally; but, it is now held that as a given state of facts, it is for the court to say whether negligence can be inferred; and for the jury to say whether it ought to be inferred. *San Antonio & Aransas Pass R. R. v. Long*, 4 Tex. Civ. App. 497.

² *Mynning v. Detroit, L. & N. R. R.*, 67 Mich. 677.

³ *Nugent v. Boston, Concord & Montreal R. R.*, 80 Maine, 62.

⁴ *Chautauqua Lake Ice Co. v. McLucky*, 11 Atl. Rep. 616 (Penn. 1887); *Dougherty v. Missouri R. R.*, 97 Mo. 647.

⁵ *Steamship Belgenland v. Jansen*, 114 U. S. 355 (in Admiralty).

⁶ See *Kaminitsky v. Northeastern R. R.*, 25 S. C. 53; *Clarke v. Rhode Island Electric Lighting Co.*, 17 Atl. Rep. 59 (R. I. 1889).

⁷ *Patterson v. Hemenway*, 148 Mass. 94; *Messenger v. Dennie*, 137 Mass. 197, 141 Mass. 335; *Ridenhour v. Kansas City Cable Railway*, 102 Mo. 270.

fifteen was injured while running a machine with which he was perfectly familiar, and it appeared from the testimony of the plaintiff himself that the danger of getting caught in the machine was obvious, and that he well understood what the danger was and how it was to be avoided.¹ So where a child seven years and one-half old persisted in running across a street diagonally and not at a crossing, in front of a moving street-car in spite of the warnings of the driver, and was killed by collision with the car, it was held as matter of law that she was negligent.² The care to be expected from children is always proportioned to their age and intelligence,³ and although in some cases the negligence of the child is so apparent as to justify the court in finding it as matter of

¹ *Probert v. Phipps*, 149 Mass. 258, and see *Twist v. Winona & St. P. R. R.*, 39 Minn. 164; *Frauenthal v. La Clede Gas Light Co.*, 67 Mo. App. 1. Negligence has been imputed to a child of seven and one-half years, *Chicago & Alton R. R. v. Murray*, 62 Ill. 326; and to an infant of seven, *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370; *Stone v. Dry Dock, E. B. & B. R. R.*, 46 Hun, 184, 115 N. Y. 104. So to a child of eight, *St. Louis & S. F. R. v. Christian*, 8 Tex. Civ. App. 246; to one of nine, *Mullen v. Springfield St. Railway*, 164 Mass. 450, and to one of ten years, *Sheets v. Connolly Railway*, 54 N. J. L. 518.

² *Flanagan v. People's, &c. Railway*, 163 Penn. St. 376. See *Fleishman v. Neversink Mt. R. R.*, 174 Penn. St. 510; *Funk v. Electric Traction Co.*, 175 Penn. St. 559. But where a child started to cross the railway track in the middle of the block and the motorman's attention was directed elsewhere, and he paid no attention to calls from persons on the sidewalk, it was held that the questions of negligence and contributory negligence were for the jury. *Evers v. Phil. Traction Co.*, 176 Penn. St. 376.

³ *Pennsylvania R. R. v. Kelly*, 31 Penn. St. 372; *Philadelphia Passenger R. R. v. Hassard*, 75 Penn. St. 367; *Greenway v. Conroy*, 160 Penn. St. 185; *Pekin v. McMahon*, 154 Ill. 141; *Springfield Cons. R. R. v. Welsch*, 156 Ill. 511; *Foley v. California Horse Shoe Co.*, 115 Cal. 184; *O'Mara v. Hudson River R. R.*, 38 N. Y. 445; *Thompson v. Buffalo R. R.*, 145 N. Y. 196; *Kansas Pacific R. R. v. Whipple*, 39 Kan. 531; *Western & Atlantic R. R. v. Young*, 81 Ga. 397; *Erwin v. St. Louis, Iron Mt. & Southern R. R.*, 96 Mo. 290; *Rummele v. Allegheny Heating Co.*, 16 Atl. Rep. 78 (Penn. 1888); *Strawbridge v. Bradford*, 24 W. N. C. 536; *Wright v. Detroit, G. H. & M. R. R.*, 77 Mich. 221; *Cleveland Rolling Mill v. Corrigan*, 20 N. E. Rep. 466 (Ohio 1890); *Bridger v. Asheville & S. R. R.*, 25 S. C. 24. But an infant of eighteen years old was held to the degree of care to which a prudent adult would be held in like circumstances. *Shelley v. Austin*, 74 Tex. 608.

law, yet, generally, the question is to be submitted to the jury, although the circumstances, in the case of an adult, would call for a ruling that as matter of law the plaintiff could not maintain his action.¹ And it has been held that it cannot be inferred as matter of law from any conduct of an infant of tender years that such infant has been guilty of contributory negligence.²

§ 96. **Presumption that Plaintiff will take Care of himself.** — A person exercising an employment or discharging a duty,

¹ *Stone v. Dry Dock, E. B. & B. R. R.*, 115 N. Y. 104; *Dealey v. Muller*, 149 Mass. 432; *Wiswell v. Doyle*, 160 Mass. 42; *Johnson v. Reading Railway*, 160 Penn. St. 647. In the case of a child of tender years, where it might fairly be inferred that he was misled or confused in respect to the actual situation, and that his conduct was not unreasonable in view of those circumstances, and his age, the question of contributory negligence is for the jury, although the child may have omitted some precautions, which omission, in the case of an adult, would have been conclusive of negligence. *Barry v. New York Central & H. R. R. R.*, 92 N. Y. 289, and see *McGovern v. New York Central & H. R. R. R.*, 67 N. Y. 417.

² See *Mackey v. Vicksburg*, 64 Miss. 777; *Westbrook v. Mobile & Ohio R. R.*, 66 Miss. 560; *Vicksburg v. McLain*, 67 Miss. 4. In South Carolina, it was held that where the pleadings put the question of the infant plaintiff's capacity in issue it was not the duty of the court to charge, as matter of law, that the plaintiff was *sui juris*. *Bridger v. Asheville & S. R. R.*, 25 S. C. 24. It was held in Kansas that although an infant killed while playing upon the turn-table of a railroad company had intelligence enough to know that it was wrong to trespass upon the turn-table, yet, if he had no knowledge that the playing on the turn-table was dangerous, it cannot be said that he was guilty of contributory negligence. *Union Pacific R. R. v. Dunden*, 37 Kan. 1. In *Norfolk & Petersburg R. R. v. Ormsby*, 27 Grat. 455, it was held, as matter of law, that a child two years and ten months old could not be guilty of contributory negligence; and see *Walters v. Chicago, R. I. & Pacific R. R.*, 41 Iowa, 71. But it is apprehended that that is an unsafe rule of law which holds that an infant of tender years cannot be guilty of negligence, and that the contrary rule, as explained and guarded in the cases cited *supra*, is correct. In *St. Paul v. Kuby*, 8 Minn. 154, it was held that there was no presumption of law that a child four and one-half years old did not exercise due care in circumstances of danger. See also *Brown v. European & N. A. Railway*, 58 Maine, 384; *Crissey v. Hestonville, &c. Railway*, 75 Penn. St. 83. In *Grant v. Fitchburg*, 160 Mass. 16, it was held, as matter of law, that a child twenty months old was incapable of exercising due care for himself in a public street. See *Schneidau v. N. O. & C. R. R.*, 48 La. Ann. 866; *Culbertson v. City R. R.*, 48 La. Ann. 1376, as cited *post*, § 97.

the carrying out of which may be attended with danger to others, has a right to presume that those with whom he comes in contact will exercise the proper regard for their own safety which prudent men are accustomed to exercise in like circumstances, and, further, that they are possessed of the ordinary faculties and capacities, mental and physical, which enable ordinary men to foresee danger and to avoid it. Thus the servants of a railroad, in charge of its train, have the right to assume, in the absence of contrary information, that a person about to cross the track, in front of the train, is in possession of all his senses and will use them for his own safety.¹ And so as to a trespasser on the track;² or a person there by right, as an employee.³ So one driving upon the highway who knows nothing and sees nothing to indicate that a person crossing the highway cannot take as much care of himself as persons in that situation ordinarily do, has a right to drive on, with the expectation that the person so crossing will behave as other men do,—that is, that he will see and hear the approaching team and look out for his own safety.⁴ Generally, it seems that when an injury, not resulting from implied malice or wilful intent, would not have resulted but from the incapacity of the person suffering it, the person inflicting such injury will not be responsible therefor, unless he knew, or ought to have known, of the incapacity. And this is the rule whether the incapacity be mental or physical. Thus where the conductor of a railway train put an insane person off the train, where he was travelling without a ticket, the conductor's action being in obedience to the rule of the road, and the conductor having no means of knowing that the person was insane, and in consequence of the conductor's action, the lunatic was run over and killed, it was held that the conductor was not chargeable with negligence.⁵

¹ *International & G. N. R. R. v. Garcia*, 75 Tex. 593.

² *Candee v. Kansas City, &c. Railway*, 130 Mo. 142; *McLaughlin v. N. O. &c. R. R.*, 48 La Ann. 23.

³ *Nelling v. Chic., St. P. & K. C. R. R.*, 98 Iowa, 554.

⁴ *Neff v. Wellesley*, 148 Mass. 487, 492.

⁵ *Willetts v. Buffalo & Rochester R. R.*, 14 Barb. 585. So where an idiot, crossing a railroad track, was seen by the engineer in charge of an approaching train, in time to have stopped the train, which he did not do;

SECTION II.

THE DOCTRINE OF PROXIMATE CAUSE.

§ 97. **Defined.**—In actions for personal injuries, as the right to recover rests upon the alleged wrongful or negligent act of the defendant, the maxim, *causa proxima, non remota, spectatur*, is applied. The proximate cause is to be defined, generally, as the cause which led to or might naturally be expected to produce the result. So, when both parties are present and acting as voluntary agents, and both are in default, he will be responsible for the result whose negligence was the directly contributing factor to produce it;¹ and, an efficient adequate cause being discovered, that is to be deemed the true cause, unless some new cause, not incidental to, but independent of the first, shall be found to intervene between the first cause and the final result.² But, “when two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether without the concurrence of both it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without concurrence, so that it cannot be attributed to that cause for which he is answerable.”³ It is to be

it was held that this did not create a presumption of negligence on the part of the engineer, he not knowing that the person so crossing was an idiot. *Daily v. Richmond & D. R. R.*, 106 N. C. 301. It is obvious that if the defendant knew or ought to have known of the plaintiff's incapacity, he is bound to exercise a degree of care proportioned to the circumstances. See *Neff v. Wellesley*, 148 Mass. 487; *Kennedy v. Denver, St. P. & P. R. R.*, 10 Col. 493.

¹ *State v. Manchester & Lawrence R. R.*, 52 N. H. 528. Thus the mere fact of the violation of a statute, ordinance, rule, or regulation by the person charged with negligence is not material as bearing upon the issue, unless it appear that such violation was at least a contributing cause of the injury. See §§ 140, 141, 153, *post*.

² Per Thomas, J., in *Marble v. Worcester*, 4 Gray, 395, 412.

³ *Marble v. Worcester*, 4 Gray, 395. In this case, Shaw, C. J., said:

observed that an injury that is the result of many fortuitous circumstances, no one of which can fairly be said to be the proximate cause of it, is to be taken as an inevitable accident, and, so, not actionable.¹ And an injury that could not reasonably have been anticipated by an ordinarily prudent man, as the natural result of his negligence, is not actionable.² Thus the fact that a child may be incapable of contributory negligence does not of necessity make the defendant liable upon the mere proof of an act causing injury; as where the proximate cause of the injury was a sudden and unexpected act of the child as running against or under a passing street-car; the persons in charge of the car not being negligent.³ The mere violation of law, whether by the plaintiff or defendant, will not be taken to prove the negligence of either party,

“The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of mystery. It was a maxim . . . of the school-men, *Causa causantis, causa est causati*. And this makes the chain of causation, by successive links, endless. . . Perhaps no event can occur, which may be considered as insulated and independent; every event is itself the effect of some cause or combination of causes, and in its turn becomes the cause of many ensuing consequences more or less immediate or remote. The law, however, looks to a practical rule . . . ; and on account of the difficulty in unravelling a combination of causes, and of tracing each result . . . to its true, real, and efficient cause, the law has adopted the rule . . . of regarding the proximate and not the remote cause of the occurrence which is the subject of inquiry.” And it is to be observed that the law regards only the chain of tangible physical facts or events. In law, if A. strikes and injures B. the immediate and only cause of the injury to B. is the blow. The metaphysician however would trace the cause of the blow to the influence of revenge, or other passion, working in A.’s mind, and, again, the existence of such passion to its own creating cause, in some previous injury inflicted on A. by B.; and so on *ad infinitum*. It is said by Lord Bacon: “It were infinite for the law to consider the causes of causes, and their impulsion of each other; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.” *Maxims of Law*, 1.

¹ Chicago, M. & St. P. R. R. v. Elliott, 55. Fed. Rep. 949; 5 C. C. A. 347.

² Motey v. Pickle Marble Co., 36 U. S. App. 682; McCain v. Chic., B. & Q. R. R., 40 U. S. App. 181.

³ Schneidau v. N. O. & C. R. R., 48 La Ann. 866; Culbertson v. Central City R. R., 48 La Ann. 1376.

per se, unless such violation appears to be the proximate cause of the injury complained of.¹

§ 98. **Connection of Cause and Effect.** — In applying the doctrine of proximate cause it is not necessary that the connection between the cause and the effect shall be proved beyond the possibility of doubt, or that such connection be cognizable by the senses. It is sufficient if the evidence of the connection produce that moral conviction upon which men are accustomed to act in the important concerns of life, and it is only necessary that the jury be reasonably satisfied that the alleged cause was in fact the proximate cause of the effect complained of. Thus where a landlord, knowing that a tenement owned by him was dangerously infected with small-pox, leased it to the plaintiff, and the plaintiff's family soon after sickened with the disease, it was held that the jury might properly find that the act of letting was the proximate cause of the sickness of the plaintiff's family.² It may be said generally, if a chain of causes lead up to and each is necessary to produce a certain result, that the last event in the chain is to be deemed in law the cause of such result. Thus while a patient cannot recover for injuries consequent upon unskilful or negligent treatment by his physician, if his own negligence directly contributed to them to an extent which cannot be distinguished or separated, yet, if the negligent acts of the physician and patient can be separated, the plaintiff may recover for such injury as proceeds solely from the want of ordinary skill or care on the part of the physician; for a physician may be called on to prescribe in a case which originated in the carelessness of the patient, and although such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability for his distinct negligence and the consequences of it. So the patient may, while under treatment, injure himself by his own carelessness, and yet recover of the physician

¹ See §§ 91, *ante*, 112, 141, *post*, and cases cited.

² *Minor v. Sharon*, 112 Mass. 477. For a case in which the coincident acts of negligence of two corporations were held to be, taken together, the efficient proximate cause of an accident, so that each was liable, see *Washington & Georgetown R. R. v. Hickey*, 166 U. S. 521.

for injuries resulting from negligence or unskilful treatment afterwards; for in such case the patient's fault does not directly contribute to the injury.¹ But, unless some negligent act of the plaintiff intervene, the defendant will be responsible for the natural and probable consequences of his own wrongful act, although such act be more or less remote, in the chain of causes, from the harmful result.² Thus where the defendant sold a gun to the plaintiff's father for the use of himself and his son, and falsely represented it to be good and safe, he knowing the contrary, and the plaintiff using it was injured by its bursting, the vendor of the gun was held liable for the injury. Lord Denman in affirming judgment adopted the expression in the case, of Baron Parke, "that as there is fraud, and damage, the result of that fraud not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."³

§ 99. Rule illustrated in Cases of Runaway Accidents. — The application of the doctrine of proximate cause has often been discussed in cases of accident resulting from the frightening, and consequent running away, of horses on the highway or elsewhere. The general rule would seem to be that the negligence which causes the fright and consequent running of the horse is the proximate cause of the resulting injury, and that this is so although some intervening cause contribute to the injury. Thus if a horse be frightened by a railway car unlawfully and negligently left upon a street crossing, and runs and injures his driver, the proximate cause of the injury is the leaving of the horse.⁴ So if a horse be negligently left untied in the highway, and runs, and injures a traveller, the proximate cause of the injury is the leaving of the horse,

¹ Hibbard v. Thompson, 109 Mass. 286. See § 133, *post*.

² The E. D. Holton, 31 U. S. App. 317; Killien v. Long Island R. R., 35 U. S. App. 215.

³ Levy v. Langridge, 4 M. & W. 337, and see Langridge v. Levy, 2 M. & W. 519.

⁴ Peterson v. Chicago & W. M. R. R., 64 Mich. 621; Lambeck v. Grand Rapids R. R., 106 Mich. 512; St. Louis, &c. R. R. v. Aven, 61 Ark. 141.

although the efforts of persons to catch him increase the speed with which he runs,¹ or although the immediate cause of his running be something for which the person having him in charge is not responsible, as the falling of hot water upon him from the locomotive of an elevated railway.² So where the negligent act of the defendant frightened the plaintiff's horse, and he ran, and the rein broke, and the plaintiff was thrown out and injured, it was held that it was for the jury to say whether the frightening of the horse or the breaking of the rein was the proximate cause of the injury.³ But where the owner or custodian of the horses is not chargeable with negligence, as where horses attached to a wagon were standing in a public street, such horses being ordinarily quiet and steady, and, becoming frightened, backed over a precipice which the defendant city had negligently left unguarded, it was held that the frightened condition of the horses was not the proximate cause of the accident and that the plaintiff might recover.⁴

¹ *Phillips v. De Wald*, 79 Ga. 732.

² *Rompillon v. Abbott*, 1 N. Y. Sup. N. E. Rep. 662 (1888).

³ *Putman v. New York Central & H. R. R. R.*, 54 N. Y. S. C. 439.

⁴ *Olsen v. Chippewa Falls*, 71 Wis. 558. Where the plaintiff's horse became frightened on a dark night and ran against a post causing injury, but it did not appear that he was out of control, or that any one had frightened him, it was held that the question whether the running of the horse was the proximate cause of the injury was for the jury. *Yeaw v. Williams*, 15 R. I. 20. It was held in Illinois, apparently in opposition to the principle as stated above, where horses with a wagon attached ran away and came into collision with another wagon, thereby injuring an occupant of the second wagon, that the collision was the proximate cause of the injury, although the runaway horses might have been checked had the driver of them used due care in the management of them. *Belk v. People*, 125 Ill. 184. Where a horse attached to a carriage became unmanageable and began to run about one hundred and sixty feet from a point on a highway which was alleged to be defective for want of a railing, it was held that the alleged defect was not the proximate cause of the injury. *Higgins v. Boston*, 148 Mass. 484. See *Ovington v. Lowell & Suburban Railway*, 163 Mass. 440. Where a horse belonging to a street-car company ran away, and striking a post on the sidewalk was thrown down, thereby frightening a woman who was standing in a doorway so as to induce in her a nervous disease, it was held that the running of the horse was not the proximate cause of the injury to her. *Lehman v. Brooklyn City R. R.*, 47 Hun, 439.

§ 100. **Nearest Negligent Act referred to.** — It may be said, generally, that the tendency of the later cases is to refer the proximate cause of the injury, in any case, to the wrongful or negligent act in the chain of causation, unless this act shall clearly appear to be too remote from the injury to justify such a reference.¹ Thus if snow falls from a roof, and striking the plaintiff's horse causes him to run away, whereby the plaintiff is injured, the fall of the snow is taken to be the proximate cause of the injury.² So it was held that if a part of a highway where an accident happened was so defective as to render the town liable in case an accident had happened by reason of the defect, in the absence of an obstruction caused by ice at the same point, and the accident happened by reason of the defect, and would not have happened but for it; then the town would not be liable even though the ice was one of

¹ See *Northern Central R. R. v. State*, 29 Md. 420; *Baltimore & Ohio R. R. v. State*, 33 Md. 542; *North Balt. Pass. Railway v. Arnreich*, 78 Md. 589; *Balt. Traction Co. v. Appel*, 80 Md. 603; *Thatcher v. Cent. Traction Co.*, 166 Penn. St. 632; *Kincaid v. Kansas City, C. & S. R. R.*, 62 Mo. App. 365; *Ragland v. St. Louis, I. M. & So. R. R.*, 49 La Ann. 1162; *Cleveland, C. C., & I. R. R. v. Wynant*, 134 Ind. 681; *Georgia Southern R. R. v. George*, 92 Ga. 766; *Green v. Erie Railway*, 11 Hun, 333; *Murphy v. Orr*, 96 N. Y. 14; *Moebus v. Herrman*, 108 N. Y. 349. This principle rests upon the proposition, often laid down, that, although the plaintiff was negligent, yet if the defendant might, by the exercise of reasonable care, have avoided the results of the plaintiff's precedent negligence, and fails to do so, he may be liable. But it is obvious that if a negligent act of the plaintiff, without which the accident would not have happened, intervene between the negligent act of the defendant and the result with which it is sought to charge him, such act of the plaintiff is the proximate cause of the injury. Thus, where one left his house voluntarily and unnecessarily to help extinguish a fire at some distance which had been set by the defendant's negligence, and in so helping was fatally burned, it was held that the proximate cause of his injury was his own act in leaving his house. *Pike v. Grand Trunk Railway*, 39 Fed. Rep. 255. And where an infant, permitted by his parents to play in the street, ran behind a street-car, clinging to the rear brake, and the driver, there being no conductor, struck the child twice with his whip to make him let go, and the child thereupon ran under the wheels of a car moving in an opposite direction and was fatally injured, it was held that the act of the driver was not the proximate cause of the injury. *Mack v. Lombard & S. St. P. R. R.*, 8 Pa. Ct. Rep. 305.

² *Smethurst v. Barton Square Church*, 148 Mass. 261.

the contributing causes of the accident.¹ Where the municipality, for a lawful purpose, made an excavation in one of its streets, which it guarded by proper barriers, which barriers a third party removed, it was held that such removal was the proximate cause of the injury to one who fell into the excavation.² Where the plaintiff, driving on the highway, met a person also driving who did not keep to the right as required by law, and in consequence was forced upon the side of the road and so came into collision with a post standing outside the carriage way, it was held that the failure of the third party to keep to the right was the proximate cause of the collision and resulting injury, and that the defendant municipality was not liable.³ The same tendency appears in many cases of railway accident. Thus where a railway train had become uncoupled by reason of a defective appliance, and a brakeman, while engaged in repairing the mishap in the part of the train that was stationary, was killed by the negligence of the engineer in backing down upon him the moving portion of the train, it was held that the proximate cause of the killing was the negligence of the engineer.⁴ Where a person injured at a railroad crossing would have passed safely had not the train which injured him been running at an unlawful rate of speed, it was held that the unlawful rate of speed was the proximate cause of the accident.⁵ So where a man with his infant son was crossing a bridge, and the son fell through an opening in the railing, and the father plunged into the water to rescue him and was drowned, it was held

¹ *Hampson v. Taylor*, 15 R. I. 83.

² *Parker v. Cohoes*, 74 N. Y. 610.

³ *Mahogany v. Ward*, 16 R. I. 479. Where a horse was frightened by a moving street-car, and ran, and the driver, being brought in collision with a dangerous obstruction in the street, was injured, the obstruction was considered to be the proximate cause of the injury, *Campbell v. Stillwater*, 32 Minn. 308; but where the horse took fright at a hole in a culvert and ran, and threw the traveller into the ditch at the side of the way, it was held that the existence of the hole was the remote cause only of the subsequent injury. *Spaulding v. Winslow*, 74 Maine, 533; *O'Brien v. McGlinchy*, 68 Maine, 557.

⁴ *Course v. New York, Lake Erie & W. R. R.*, 2 N. Y. Sup. N. E. Rep. 512, *Dykman, J.*, dissenting (1888).

⁵ *Winstanley v. Chicago, Milwaukee & St. P. R. R.*, 72 Wis. 375.

that although the immediate cause of the peril to which the father naturally and instinctively exposed himself was the peril of the child, the culpable negligence of the State in leaving the bridge in a dangerous condition was the proximate cause of the father's death.¹ A railroad left an unexploded signal-torpedo upon its track where children, with the knowledge and without the disapproval of the railroad, were accustomed to play. It was picked up by a boy nine years old, who carried it into a crowd of boys near by, and, not knowing what it was, attempted to open it, when it exploded and injured the plaintiff, a child of ten years. It was held that the act of the boy who picked up the torpedo was only a contributory condition which the servants of the company ought to have anticipated as a probable consequence of their own negligence, which negligence was the proximate cause of the injury complained of.² Where the plaintiff's

¹ *Gibney v. State*, 137 N. Y. 1.

² *Harriman v. Pittsburg, C. & St. L. R. R.*, 45 Ohio St. 11. Where iron beams were negligently left piled near a hole in a floor, where they were likely to be toppled over so as to fall through the hole and injure some one below, and a careless person did so topple them over, and they fell through the hole and injured the plaintiff, it was held to be a question of fact whether the careless piling of the beams was the proximate cause of the injury. *McCauley v. Norcross*, 155 Mass. 584. Where by the negligence of a railroad company, defendant, an animal was thrown from its track, and, bounding upon the ground, struck and injured the plaintiff, it was held that the proximate cause of the injury was the negligent act of the defendant. *Alabama G. S. R. R. v. Chapman*, 80 Ala. 615. But where the employee of a railroad company in order to get out of the way of a train which had been started without the proper signal, stepped between the track and a sand-bank two feet distant therefrom, and a quantity of sand fell from the bank, striking him and knocking him against the wheels of the moving train, whereby he was injured, it was held that the immediate cause of the injury was the falling of the bank and that the plaintiff could not recover. *Handelun v. Burlington, C., R. & N. Railway*, 72 Iowa, 709. If the neglect of the defendant was the moving cause of the accident, he will be liable, although at the moment of the accident it was beyond his power to prevent it. *Alexander v. Humber*, 86 Ky. 565. Where a railway company left a locomotive unattended, and with fire in it, on a side track, and a wrong-doer moved the engine on to the main track, whereby a collision ensued, it was held that the leaving the engine was not the proximate cause of the collision. *Mars v. Delaware & Hudson Canal Co.*, 54 Hun, 625. Where, by a col-

horse took fright at the defendant's engine and ran over a third person, who recovered damages for his injuries, against the plaintiff, it was held that the latter might recover the same of the defendant on showing that he could not have prevented the accident and that the defendant could.¹ If the defendant's duty to select suitable servants, is not performed and injury results, the proximate cause is to be considered the negligence in selection.²

§ 101. **Rule applied to Cases of Plaintiff's Negligence.** — Since the law regards only that negligence which is the proximate cause of the injury complained of, it follows that, although the plaintiff were negligent, yet, unless by the exercise of ordinary care he might have avoided the consequences of the defendant's negligence, he may be entitled to recover.³ As the rule is sometimes stated, if the plaintiff's negligence had nothing to do with the accident, the fact of such negligence is not a defence to his action.⁴ So, a person may recover damages for

lision between two railway trains, a person was so injured that he subsequently became insane and committed suicide, it was held that the proximate cause of his death was his own act, and Miller, J., said: "His insanity as a cause of his final destruction was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual and unexpected causes intervening between the act which injured him and his death." *Scheffer v. Washington City, &c. R. R.*, 105 U. S. 249. And it seems generally that where the injury, not resulting from implied malice or wilful intent, would not have resulted but from the incapacity of the party suffering it, that the party inflicting such injury will not be responsible in damages therefor, unless he had notice of the incapacity, or was charged with some peculiar duty in respect of the insane person which he tortiously or carelessly neglects. See *Buswell, Law of Insanity*, p. 358, *note*, and cases cited.

¹ *Nashua Iron & Steel Co. v. Nashua & Worcester R. R.*, 62 N. H. 159.

² *Norfolk & Western R. R. v. Hoover*, 79 Md. 253.

³ *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 546.

⁴ See *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65; *Savage v. Commercial Exchange Ins. Co.*, 36 N. Y. 655; *Hawks v. Winans*, 74 N. Y. 609; *Haley v. Earle*, 30 N. Y. 208; *Teall v. Barden*, 40 Barb. 137; *Short v. Knapp*, 2 Daly, 150, 2 Abb. Pr. n. s. 241; *Caldwell v. Murphy*, 1 Duer, 233, 1 Kern. 416; *Colgrove v. H. & N. R. R.*, 6 Duer, 383; *Trow v. Vermont Cent. R. R.*, 24 Vt. 487; *Beers v. Housatonic R. R.*, 19 Conn. 566; *Dowell v. General Steam Nav. Co.*, 5 El. & Bl. 195; *Greenland v.*

an injury caused by the negligence of the defendant, although the negligence of the plaintiff first exposed him to the risk of injury, if such injury was proximately caused by the defendant's negligent act, committed after he had become aware of the plaintiff's danger; and the rule is the same if the defendant's negligence be by omission only.¹ Although the principle has sometimes been differently stated, the sound reason of the rule is that if the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not immediately contributory thereto, the plaintiff will not be precluded from a recovery,² if the defendant, being aware of the plaintiff's danger, neglected to use ordinary care to avoid injuring him.³ Thus where one was negligently driving on the track of a street railway, and the servant of the railway company negligently started a car and a collision ensued as a result of such starting by which the plaintiff was injured, it was held that he might recover.⁴ And so where the employee of a railroad negligently exposed himself to injury in the first place, but the defendant's other servants might, by the exercise of ordinary care, have avoided injuring him, the railroad was held liable.⁵ Where the defendant's servant broke off a car stake, thus letting lumber fall upon the plaintiff and injuring him, it was held that the prior negligence of the plaintiff

Chaplin, 5 Exch. 248; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *Werner v. Citizens' Railway*, 81 Mo. 368; *Illinois Central R. R. v. Godfrey*, 71 Ill. 500.

¹ See cases cited §§ 107, 108, 108 *a, post*.

² *Menger v. Laur*, 55 N. J. L. 205.

³ *Railroad v. Cassen*, 49 Ohio St. 230; and see *Union Pacific R. R. v. Mertes*, 35 Neb. 204; *Omaha Street R. R. v. Martin*, 48 Neb. 66; *Brother-ton v. Manhattan Beach Co.*, 48 Neb. 563; *Pickett v. Wilmington & W. R. R.*, 117 N. C. 616; *Johnson v. Chesapeake & Ohio R. R.*, 91 Va. 171; *Washington R. R. v. Lacey*, 94 Va. 460; *McGuire v. Vicksburg, S. & Pac. R. R.*, 46 La. Ann. 1543; *Noble v. St. Joseph, &c. Railway*, 98 Mich. 249; *Alabama Great So. R. R. v. Richie*, 99 Ala. 346; *Lake Shore & M. S. R. R. v. Bodemer*, 139 Ill. 596; *Dlanhi v. St. Louis, I. M. &c. R. R.*, 139 Mo. 291; *Western Md. R. R. v. Kehoe*, 83 Md. 434; *Texas & Pac. R. R. v. Robinson*, 4 Tex. Civ. App. 121; *Int. & Great Northern R. R. v. Tabor*, 12 Tex. Civ. App. 283.

⁴ *McDivitt v. Des Moines St. Railway*, 99 Iowa, 141.

⁵ *Kansas & Ark. Valley R. R. v. Fitzhugh*, 61 Ark. 341.

in carelessly loading the lumber was not the proximate cause of his injury; but a prior and independent transaction, and, as such, no part of the direct and efficient cause of the injury.¹ This rule has been applied in cases of injuries to infant children, in those jurisdictions where the negligence of the parent is not permitted to be imputed to the child.²

§ 102. Doctrine of "Comparative Negligence" disapproved. — Even although the plaintiff, at the time he was injured, was engaged in the doing of some unlawful act, as driving at a prohibited rate of speed, or on the wrong side of the road, or on a turnpike without paying toll,³ or was trespassing on the defendant's property,⁴ he may recover if his own negligence or wrong-doing was not the proximate cause of his injury. On the other hand, if both parties are negligent it will not be ground for the plaintiff to recover that the negligence of the defendant was greater than his own; but, in order to a recovery, it must appear further that the plaintiff's negligence in no manner contributed to cause the injury of which the plaintiff complains.⁵ In other words, the plaintiff may recover if, on the one hand, he proves that his own negligence was not the proximate cause, and on the other that the defendant's negligence was the proximate cause of the injury. And as in every case in which negligence is alleged on both sides, the question is not merely which party was the most negligent, but which party, by his negligence, caused the injury complained of, it follows that that is not a sound rule which has sometimes been stated without qualification, that the plaintiff is entitled to recover if the defendant's negligence is greater than his own, and that the defendant is not liable if the plaintiff's negligence was equal to, or exceeded his own.⁶

¹ Pollard v. Maine Central R. R., 87 Maine, 51.

² Chicago W. Div. Railway v. Ryan, 131 Ill. 474. See Philadelphia & Reading R. R. v. Spearen, 47 Penn. St. 300.

³ Norris v. Litchfield, 35 N. H. 271.

⁴ Loomis v. Terry, 17 Wend. 496; Greenland v. Chaplin, 5 Ex. 243; Bird v. Holbrook, 4 Bingham, 628.

⁵ Marble v. Ross, 124 Mass. 44, and see Richmond & Danville R. R. v. Howard, 79 Ga. 44.

⁶ The doctrine of "comparative negligence" formerly obtained in

§ 103. Contributing Negligence of Third Person not to defeat Remedy.—It is a general rule, that a person injured by the

Illinois. See *Kerr v. Forgue*, 54 Ill. 482; *Chicago, B. & Q. R. R. v. Van Patten*, 64 Ill. 510; *Chicago & Alton R. R. v. Fietsam*, 123 Ill. 518; *Fisher v. Cook*, 125 Ill. 288; *Willard v. Swanson*, 126 Ill. 381; *Christian v. Erwin*, 125 Ill. 619; *Parmelee v. Farro*, 22 Ill. App. 467. It will be observed that the doctrine rested, as stated in Illinois, upon the assumption that the law recognizes the existence of "degrees" of negligence, see § 92, *ante*, it having been held that the jury should be instructed to compare the negligence of the parties, and to ascertain whether that of the one is "slight" and the other "gross." *Chicago, Milwaukee & St. Paul R. R. v. Mason*, 27 Ill. App. 450. See, also, *Tomle v. Hampton*, 28 Ill. App. 142, 129 Ill. 379; *Galesburg v. Benedict*, 22 Ill. App. 111; *Chicago, Burlington & Quincy R. R. v. Warner*, 22 Ill. App. 462, 123 Ill. 38; *Illinois Central R. R. v. Neer*, 26 Ill. App. 356. The later cases have greatly qualified the doctrine (see *Calumet I. & S. Co., v. Martin*, 115 Ill. 358; *Atchison, Top. & Santa Fe R. R. v. Feehan*, 149 Ill. 202, and cases cited); and it is now finally overruled; the rule in Illinois being, as elsewhere, that in order to recover the plaintiff must have exercised ordinary care, and the defendant must have been guilty of such negligence as caused the injury complained of. *Lanark v. Dougherty*, 153 Ill. 163 (1894). The doctrine of comparative negligence is accepted in Georgia, see *Campbell v. Atlantic R. R.*, 53 Ga. 488; *Atlantic & W. P. R. R. v. Wyly*, 65 Ga. 120; *Central R. R. & Banking Co. v. Gleason*, 69 Ga. 200; *Atlantic & R. A. L. R. R. v. Ayres*, 53 Ga. 12; *Savannah, &c. R. R. v. Smith*, 93 Ga. 742; and, by the Code of that State, § 3034, it is provided that in actions against railroad companies for negligent injuries to persons or property, if the plaintiff and defendant are both in fault, the complainant may recover, but that his damages shall be diminished in proportion to his fault. It is held that this provision has no application when the plaintiff has been guilty of gross negligence. So in Kansas it has been held that where the negligence of one party is great and that of the other but slight, notwithstanding the slight negligence the party may recover. *Wichita & Western R. R. v. Davis*, 37 Kan. 743. See *Orleans v. Perry*, 24 Neb. 831, 836. In Alabama it is held that the "gross negligence" of the defendant is not sufficient to overcome the contributory negligence of the plaintiff, unless it be such negligence as is wanton, reckless, or intentional. *Carrington v. Louisville & Nashville R. R.*, 88 Ala. 472; but see *Gothard v. A. G. S. R. R.*, 67 Ala. 114. In Tennessee the doctrine seems to be applied in favor of the defendant in mitigation of damages. *Railroad v. Walker*, 11 Heisk. 383; *Louisville, Nashville & G. S. R. R. v. Fleming*, 14 Lea, 128. In the following cases the doctrine has distinctly been disapproved: *Catawissa R. R. v. Armstrong*, 49 Penn. St. 186, 193; *Stiles v. Geesey*, 71 Penn. St. 439; *Wilds v. Hudson River R. R.*, 24 N. Y. 430, 432; *Marble v. Ross*, 124 Mass. 44; *O'Keefe v.*

fault of another, without which fault the injury could not have occurred, is not to be deprived of his remedy because the fault of a stranger, not in privity with him, also contributed to the injury. For the original negligence still remains as a culpable and direct cause of the injury, and the intervening events and agencies which may contribute to it are not to be regarded.¹ This is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person towards whom the plaintiff sustains the relation of superior or master; in which case the negligence is imputed to him, though he may not have personally participated in, or had knowledge of it.² So a defendant, a gas company, laid a defective pipe, which leaked into the plaintiff's cellar. The servant of a gas-fitter, employed to examine the premises by the plaintiff, went into the cellar with a lighted lamp, and an explosion followed which caused injury to the plaintiff. It was held that the gas company was liable therefor, and Kelly, C. B., said: "If a man sustains an injury from the separate negligence of two persons employed on his premises to do two separate things, as in this case the plaintiff has sustained an injury from the negligence of the gas-fitter's servant on the one hand, and of the gas company on the other, he can, in Chicago, R. I. & Pac. R. R., 32 Iowa, 467; *Banning v. Chic.*, R. I. & Pac. R. R., 89 Iowa, 74; *Potter v. Chicago & N. W. R. R.*, 21 Wis. 372; *Baltimore & Ohio R. R. v. State*, 33 Md. 542; *Pennsylvania R. R. v. Righter*, 42 N. J. L. 180; *Kansas Pacific R. R. v. Peavey*, 29 Kan. 170; *Houston & Texas Central R. R. v. Garbett*, 49 Tex. 573; *Brooks v. Hannibal & St. Jo. R. R.*, 35 Mo. App. 571; *Culbertson v. Holliday*, 50 Neb. 229.

¹ *Lane v. Atlantic Works*, 111 Mass. 136. But where the immediate cause of the injury is the wrongful and wilful act of a third party, the defendant is not liable; as where one was injured by falling into an excavation negligently left in a public way, and it appeared that the fall was solely caused by the act of one who wilfully seized the plaintiff and threw him into the pit. *Alexander v. New Castle*, 115 Ind. 51. It makes no difference that the person wrongfully interfering was an infant not within the age of discretion. *Otten v. Cohen*, 1 N. Y. Sup. N. E. Rep. 430 (1888). It is obvious that, in such cases, it cannot be said that without the intervening wrongful act of the third party the injury would have occurred; and so the negligence of the municipality in making or permitting the excavation cannot be taken to be the proximate cause of the injury.

² *Little v. Hackett*, 116 U. S. 366.

my opinion, maintain an action against both or either of the wrong-doers.”¹ So, if a passenger on a railway train of one company is injured by a collision with another train of a different company, he may recover against the latter company, if it was negligent; although the negligence of the persons in charge of the train in which he was travelling also contributed to cause the accident.² One of two colliding vessels, if a collision was caused by her culpable negligence, is liable in admiralty, *in rem*, for resulting injuries to passengers of the other vessel, notwithstanding the fault of such other vessel may have contributed to the accident.³ Upon an application of the general rule, it is held that the contributory negligence of a fellow-servant will not defeat an action for an injury against the common master.⁴

§ 104. **Former Qualification of the Rule in England.**—The rule stated was qualified in a line of English cases in which

¹ *Burrows v. March Gas Co.*, L. R. 5 Ex. 67; *Washington & Georgetown R. R. v. Hickey*, 166 U. S. 521. See also, to the general rule, *Sheridan v. Brooklyn, &c. R. R.*, 36 N. Y. 39; *Barrett v. Third Avenue R. R.*, 45 N. Y. 628; *Webster v. Hudson River R. R.*, 38 N. Y. 260; *Spooner v. Brooklyn R. R.*, 54 N. Y. 230; *Lannon v. Albany Gas Light Co.*, 46 Barb. 264; *Robinson v. N. Y. Central & Hudson River R. R.*, 65 Barb. 146; *Arctic Fire Ins. Co. v. Austin*, 3 Hun, 195; *Eaton v. Boston & Lowell R. R.*, 11 Allen, 500; *Burrell Township v. Uncapher*, 117 Penn. St. 353; *Citizens' Passenger R. R. v. Ketcham*, 122 Penn. St. 288; *Chartiers Turnpike v. Phillips*, 122 Penn. St. 661; *De Camp v. Sioux City*, 74 Iowa, 392; *McCandless v. Chicago & N. W. R. R.*, 71 Wis. 41; *Carterville v. Cook*, Rep. 129, Ill. 152; *Union Railway & Transit Co. v. Shacklet*, 119 Ill. 232. See § 31, *ante*.

² *Flaherty v. Northern Pacific R. R.*, 39 Minn. 328, and see *Parshall v. Minneapolis & St. L. R. R.*, 35 Fed. Rep. 649; *Indiana, B. & W. R. R. v. Barnhart*, 114 Ind. 382; and §§ 46-50, *ante*. A carrier of passengers who is guilty of a negligent act, without the occurrence of which the accident could not have happened, will be answerable in damages to a passenger who thereby suffers injury although the negligence of a third party, not in privity with nor under the control of the carrier, also contribute to the accident, and this although the accident would have been impossible but for such contributing negligence. *Eaton v. Boston & Lowell R. R.*, 11 Allen, 500; *Peck v. Neil*, 3 McLean, 22; *Lockhart v. Lichten-thaler*, 46 Penn. St. 151; *Derwort v. Lormer*, 21 Conn. 245; *Dudley v. Smith*, 1 Camp. 167.

³ *The Williamette*, 44 U. S. App. 26.

⁴ See § 201, *post*, and cases cited.

it was held, broadly, that one who trusts himself to a public conveyance so far identifies himself with the owner of the conveyance and his servants that if any injury results to him from their negligence, he must be considered a party to it. "In other words, the passenger is so far identified with the carriage in which he is travelling that want of care on the part of the driver will be a defence," and "a passenger who chooses his own conveyance must take the consequences of any default of the driver he thinks fit to trust."¹ The same rule was later applied in the case of an accident occurring to a passenger on a railway train, and Pollock, B., said that the plaintiff must be taken to be in the same position as the owner or driver of the carriage in the former case.² These cases would seem to consider the passenger and the employee of the owner of the vehicle as standing to each other *pro hac vice* in the relation of master and servant, but it is to be observed that in other cases the English courts have decided that such a relation does not exist as between the passenger and the driver of a vehicle for hire;³ and the rule laid down in *Thorogood v. Bryan* and the cases following it is now distinctly overruled in England.⁴

§ 105. **Qualification not admitted in the United States.** — In the United States, the doctrine of *Thorogood v. Bryan* is disapproved. Speaking of the assumed identification of the passenger in the vehicle with the driver upon which the

¹ *Thorogood v. Bryan*, 8 C. B. 114.

² *Armstrong v. Lancashire & Yorkshire R. R.*, 10 Exch. 47.

³ *Quarman v. Burnett*, 6 M. & W. 499; *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890. In the case of *The Milan*, Lush. 388, commenting upon the case of *Thorogood v. Bryan*, Dr. Lushington said: "I do not consider it necessary for me to dissect the judgment, but I decline to be bound by it, because . . . I know upon inquiry that it has been doubted by high authority, [and] because it appears to me not reconcilable with other principles laid down at common law." If the doctrine of *Thorogood v. Bryan* be extended, its logical application would seem so to charge the passenger with the negligence of the driver or owner of the vehicle in which he is riding, for hire, as to render him responsible for injuries thereby resulting to third persons, on the principle which renders the master generally responsible for the negligence of his servants.

⁴ *The Bernina*, 12 P. D. 58 (1888).

English doctrine rests, the court in New Jersey say: "Such identification could result only in one way, that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. . . . To hold that the conductor of a street-car or of a railroad train is the agent of the numerous passengers who may chance to be in it would be a pure fiction."¹ The true rule would seem to be that the carrier stands to the passenger in the relation of a contractor to convey the passenger to his destination, and as such assumes the risks of the transportation, including possible liabilities arising from the default or negligence of its servants. "The owner of a public conveyance is a carrier and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world."² So the negligence of

¹ *Bennett v. New Jersey R. R. & Transportation Co.*, 36 N. J. L. 225, and see *New York, L. E. & W. R. R. v. Steinbrunner*, 47 N. J. L. 161.

² Per Field, J., in *Little v. Hackett*, 116 U. S. 366. The doctrine has been disapproved, or a contrary rule held, in the following American cases, in addition to those already cited: *State v. Boston & Maine R. R.*, 80 Maine, 430; *Noyes v. Boscawen*, 64 N. H. 361; *Randolph v. O'Riordan*, 155 Mass. 331; *Chapman v. New Haven R. R.*, 19 N. Y. 341; *Coleman v. New York & N. H. R. R.*, 20 N. Y. 462; *Webster v. Hudson River R. R.*, 38 N. Y. 260; *Crawford v. Delaware L. & W. R. R.*, 54 N. Y. S. C. 262; *Dyer v. Erie R. R.*, 71 N. Y. 228; *Richardson v. VanNess*, 53 Hun, 267; *Wabash, St. L. & Pac. R. R. v. Shacklet*, 105 Ill. 364; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Davis v. Guarnieri*, 45 Ohio St. 470; *Cuddy v. Horn*, 46 Mich. 596; *Williams v. Edmunds*, 75 Mich. 92; *Danville Turnpike Co. v. Stewart*, 2 Met. (Ky.) 119; *Cahill v. Cincinnati, &c. R. R.*, 92 Ky. 345; *Louisville, C. & L. R. R. v. Case*, 9 Bush, 728; *Brannan v. Kokomo, G. & J. G. R. R.*, 115 Ind. 115; *Indiana R. R. Co. v. Spencer*, 98 Ind. 186; *Knightstown v. Musgrove*, 116 Ind. 121; *Michigan City v. Boeckling*, 122 Ind. 39; *Louisville, N. A., & C. Railway v. Creek*, 29 N. E. Rep. 481 (Ind. 1892); *Miller v. Louisville, N. A. & C. Railway*, 128 Ind. 97; *Minster v. Citizens' Railway*, 53 Mo. App. 276; *Philadelphia, Wilmington & B. R. R. v. Hogeland*, 66 Md. 149; *Nisbet v. Garner*, 75 Iowa, 314; *Sheffield v. Central Union Telegraph Co.*, 36 Fed. Rep. 164; *Missouri Pacific R. R. v. Texas Pacific R. R.*, 41 Fed. Rep. 316; *Becke v. Missouri Pacific R. R.*, 102 Mo. 544; *Elyton Land Co. v. Mingea*,

those in charge of a vessel partly in fault for a collision is not to be imputed to a passenger.¹

§ 106. **But Negligence of Person acting with or under control of, the Plaintiff may defeat the Remedy.** — When it appears that, in fact, the driver and his passenger were both in fault, the rule that the negligence of the driver may not be imputed to the passenger has no application. Since the passenger will be precluded from recovery on the ground of contributory negligence.² Thus, where one was on the same seat with, and 'had the same opportunity of discovering danger as, the driver, while they were approaching the railway crossing at which the accident happened, both the passenger and the driver were held to be negligent, so that the passenger could not recover. The court said: "The rule that the driver's negligence may not be imputed to the plaintiff . . . is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver, or is separated from the driver by an inclosure, and is without opportunity to discover the danger, and to inform the driver of it. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of the danger and avoid it, if practicable."³ So a wife in a carriage with her husband may be guilty of contributory negligence although he be driving.⁴ But this duty will not attach when the passenger is

89 Ala. 521; *Finnegan v. Foster Township*, 163 Penn. St. 135; *Atlantic & Danville R. R. v. Ironmonger*, 95 Va. 625; *Ala. & Vicksburg R. R. v. Davis*, 69 Miss. 444; *Perez v. N. O. City, &c. R. R.*, 47 La. Ann. 1391. See also *Brown v. McGregor, Hay (Scot.)*, 10, 1 Smith's L. C. 220, 4th English Ed. In *Slater v. Burlington, C. R. & N. Railway*, 71 Iowa, 209, the doctrine of *Thorogood v. Bryan* would seem to have been applied; but the report of the case does not make clear the precise ground upon which it was decided. The case is distinguished, and the general rule held, in *Wymore v. Mahaska Co.*, 78 Iowa, 396; cited § 106, *post*.

¹ *The City of Mackinac*, 43 U. S. App. 190; *The Bernina*, 12 P. D. 58.

² *Hoag v. New York Cent. & H. R. R. R.*, 111 N. Y. 199, and see *Robinson v. N. Y. C. & H. R. R. R.*, 66 N. Y. 11.

³ *Brickell v. New York Cent. & H. R. R. R.*, 120 N. Y. 290.

⁴ *Galveston, H. S. & A. R. R. v. Kutac*, 76 Tex. 473; *Miller v. Louisville, N. A. & C. R. R.*, 128 Ind. 97; *Dean v. Pennsylvania R. R. Co.*, 129

separated from the driver, as in a closed carriage,¹ or in a street railway car.² The question is whether the passenger had the opportunity and the right to see the danger and control the driver.³ The negligence of the driver will not be imputed to the passenger riding with him if the passenger himself uses all prudent means to avoid the danger.⁴ The gripman of a cable railway, being under the direction and control of the conductor, the negligence of the gripman, by reason of which the conductor is injured, will be imputed to the latter.⁵ And, by the application of the rule already stated, if a passenger is injured by the concurrent negligence of the carrier and a third person, the negligence of the carrier will not be imputed to the passenger so as to prevent him from recovering from the third person.⁶

§ 107. **Negligence of Parent or Guardian imputed to Infant.** — The rule that the contributory negligence of a third party will not defeat the plaintiff's remedy is subject to an apparent exception in those jurisdictions where it is held that if the negligence of the parent, guardian, or person having the rightful custody and control of an infant, contributes to the injury of the infant, such negligence is to be imputed to the infant, who, therefore, cannot recover for the injury to which such negligence contributed. This rule is said to be founded upon the consideration that "an infant is not *sui juris*.

Penn. St. 514. But negligence, on the wife's part, will not be presumed or inferred, and, in the absence of proof of it, her husband's negligence is not to be imputed to her. *Chicago, St. L. & P. R. R. v. Spilker*, 134 Ind. 380; *Boone County v. Mutchler*, 137 Ind. 140; *Lake Shore & M. S. R. R. v. McIntosh*, 140 Ind. 261; *Munger v. Sedalia*, 66 Mo. App. 629.

¹ *East Tenn. R. R. v. Markens*, 88 Ga. 60. See *Metropol. St. Railway v. Powell*, 89 Ga. 601; *Roach v. W. & A. R. R.*, 93 Ga. 785.

² *Railway Co. v. Harrell*, 58 Ark. 454.

³ *Larkin v. Burl.*, C. R. & N. R. R. 85 Iowa, 492; *Baltimore & Ohio R. R. v. State*, 79 Md. 335.

⁴ *Galveston, H. S. & A. R. R. v. Kutac*, 76 Tex. 473.

⁵ *Minster v. Citizens' Railway*, 53 Mo. App. 276. See *Seaman v. Koehler*, 122 N. Y. 646.

⁶ *New York, P. & N. R. R. v. Cooper*, 85 Va. 939; *Wymore v. Mahaska Co.*, 78 Iowa, 396, distinguishing *Slater v. Burlington, C. R. & N. R. R.*, 71 Iowa, 209, cited § 105, *ante*.

He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and, in respect to third persons, his act must be deemed that of the infant. His neglect is the infant's neglect."¹ It is not necessary to consider whether in such cases the negligence of the parent or guardian is fairly to be considered as the proximate cause of the injury,² or whether this class of cases forms an exception to the general application of the doctrine of proximate cause, since the rule which imputes the negligence of the parent to the child is firmly settled in several States.³ It is apprehended that the

¹ *Hartfield v. Roper*, 21 Wend. 615.

² But, in Massachusetts, it is held that if, in fact, the infant exercised due care at the time of the accident, he may recover therefor, although the parent or guardian was negligent in permitting him to go abroad, since in such a case the proximate cause of the injury is the immediate negligence of the defendant, and not the more remote contributory negligence of the parent or guardian; the effect of the rule as held in that State being that in order to prevent a recovery, there must be actual contributory negligence on the part both of the infant and of his parent or guardian. See *Lynch v. Smith*, 104 Mass. 52. But in New York it is held, by a strict application of the rule, that the acts of a child, not *sui juris*, contributing to the injury, are not a defence to an action brought therefor, unless the parent or guardian of the child was negligent. *Kunz v. Troy*, 104 N. Y. 344. It is held, in Indiana, that the general rule does not apply when the defendant has been guilty of "gross" or wanton negligence, causing the injury. *Lafayette & Indianapolis R. R. v. Huffman*, 28 Ind. 287.

³ *The Burgundia*, 29 Fed. Rep. 464; *Kunz v. Troy*, 104 N. Y. 344; *Kyne v. Wilmington & N. R. R.*, 14 Atl. Rep. 922 (Del. 1888); *Lynch v. Smith*, 104 Mass. 52; *Gibbons v. Williams*, 135 Mass. 333; *Collins v. South Boston R. R.*, 142 Mass. 301; *Casey v. Smith*, 152 Mass. 294; *Pittsburg, Fort Wayne & Chicago R. R. v. Vining*, 27 Ind. 513; *Lafayette & Indianapolis R. R. v. Huffman*, 28 Ind. 287; *Chicago & Alton R. R. v. Logue*, 157 Ill. 621 (but see § 108, *post*); *Mobile & Ohio R. R. v. Watley*, 69 Miss. 145; *Lehman v. Brooklyn*, 29 Barb. 236; *Mangam v. Brooklyn City R. R.*, 36 Barb. 230; *Morrison v. Erie Railway*, 56 N. Y. 302, 309; *Huerzeler v. Cent. Tr. Co.*, 139 N. Y. 490; *Brown v. European & North American Railway*, 58 Maine, 348, 388; *Leslie v. Lewiston*, 62 Maine, 468; *Singleton v. Eastern Counties Railway*, 7 C. B. N. s. 287; *Waite v. Northeastern Railway*, El. Bl. & El. 719, as cited *post*. See *Ewen v. Chicago & N. W. R. R.*, 38 Wis. 613, 628. It is said further, in Wisconsin, that where the child is so young as to be *non sui juris*, it is a material question whether the parent was or was not negligent in committing the child to a temporary custodian, and whether such custodian

ordinary rules, as to the questions of law and fact, are to be applied when the issue is upon the negligence of the parent or guardian of a child; and when the facts are doubtful or disputed, or, if not disputed, leave the inferences to be drawn therefrom doubtful, the whole question is for the jury.¹ So

was of proper age and discretion to care for it. *Hoppe v. Chicago, M. & St. P. R. R.*, 61 Wis. 357; *Dahl v. Michigan Central R. R.*, 62 Wis. 652; *Parish v. Eden*, 62 Wis. 272; *Hooker v. Chicago, M. & St. P. R. R.*, 76 Wis. 542. In the latter case the court avoid the decision of the question whether the negligence of the parent or guardian is properly to be imputed to the infant.

¹ *Bliss v. South Hadley*, 145 Mass. 91; *Creed v. Kendall*, 156 Mass. 291; *Quincy v. Boston Street Railway*, 163 Mass. 5; *Chrystal v. Troy & Boston R. R.*, 105 N. Y. 164; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; *Weil v. Dry Dock, E. B. & B. R. R.*, 119 N. Y. 147; *Payne v. Humeston & S. R. R.*, 70 Iowa, 584. It has been held that the question, whether the child is *sui juris*, and so capable of contributory negligence is for the jury, see *Stone v. Dry Dock, E. B. & B. R. R.*, 115 N. Y. 104. This would seem to be the application, in another form, of the ordinary rule that the measure of care to be exacted from an infant is to be proportioned to its age and capacity, and that the question whether the infant exercised such measure of care is, ordinarily, one of fact. Thus where the plaintiff was an infant seven years and six months old, the court said: "In some cases, when all the circumstances attending the act and the situation of the plaintiff are settled and undisputed, and these circumstances show, according to the common experience of all men, that the plaintiff was careless, the court has held, as matter of law, that he could not recover. But such is not this case. . . . It was the province of the jury to determine these facts, and the law leaves to their judgment and experience the inference whether or not, upon the circumstances which they found to exist, the plaintiff was using such care as is reasonably to be expected of one of her years." *Mattey v. Whittier Machine Co.*, 140 Mass. 337. The plaintiff, a boy of six years, in charge of his brother a boy of eleven, was playing in the street near a derrick which the defendant had left there over Sunday. The plaintiff sat down on the drum of a cylinder of the derrick, and another boy turned the wheel, crushing the plaintiff's finger between the cogs. It was held no error to submit to the jury the questions, 1, whether the plaintiff was or was not *sui juris*; 2, if he was, whether he was guilty of contributory negligence; 3, whether his parents were guilty of contributory negligence in permitting him to go abroad in charge of his brother; 4, whether the derrick was, under the circumstances, a dangerous machine and likely to cause injury to children, if left unguarded or unfastened; 5, whether it was so left; and, 6, if it was both dangerous to children and unguarded and unfastened, whether that, as matter of fact, constituted negligence. *Jonash v. Standard Gas Light Co.*, 56 N. Y. Supr. Ct. 447.

far as the doctrine which imputes the negligence of the parent or guardian to the child applies to the case of a child conveyed as a passenger by a common carrier, it seems to be made to rest by the English courts upon the terms of the contract of transportation. The grandmother of an infant five years old had taken it to a railway station and bought tickets for its and her own transportation by train. In crossing to the platform where they must take the train, the child was injured by a passing train. The jury, having found specially, that the grandmother was negligent, Campbell, C. J., said: "The relation of master and servant certainly did not subsist between the grandchild and the grandmother, and she cannot, in any case, be considered as his agent; but we think that the defendants, in furnishing the ticket to the one and the half ticket to the other, did not incur a greater liability towards the grandchild than towards the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild. . . . At all events, a complete identification seems to us to be constituted between the plaintiff and the party whose negligence contributed to the damage, . . . in the same manner as if the plaintiff had been a baby only a few days old, to be carried in a nurse's arms." Cockburn, C. J., said: "I put the case on this ground, that when a child of such tender years and imbecile age is brought to a railway station or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge." Pollock, C. B., said: "There is really no difference between the case of a person of tender years under the care of another, and a valuable chattel committed to the care of an individual, or even not committed to such care. The action cannot be maintained unless it can be maintained by the person having the apparent possession, even though the grandchild or the chattel was not regularly put into the possession of the person, as, for instance, though the party taking charge of the child had done so without the father's consent; that circumstance would make no difference as to

the question of the child's right."¹ But the broad reason of the rule, as being applicable to all cases, would seem to be, as stated by Cowen, J., that the parent or guardian is the keeper or agent to whom the care of the child is confided, and that, as to third persons, his negligence is that of the infant.²

§ 108. **Contrary Rule; Question discussed: Actions for Loss of Service.** — The contrary rule that "the contributory negligence of a parent, guardian, or other person having control of the child, is not to be imputed to the child himself," was laid down in a comparatively early case in Vermont,³ and has been followed in many States.⁴ As it is expressed in New Hampshire,⁵ a child of tender years may recover for an injury which might have been avoided by the exercise of ordinary care on the defendant's part, although his parent or

¹ *Waite v. Northeastern Railway*, El. Bl. & El. 719.

² *Hartfield v. Roper*, 21 Wend. 615.

³ *Robinson v. Cone*, 22 Vt. 213.

⁴ *Newman v. Phillipsburgh Horse Car Co.*, 19 Atl. Rep. 1102 (N. J. 1890); *Winters v. Kansas City Cable R. R.*, 99 Mo. 509; *Bellefontaine & Indiana R. R. v. Snyder*, 18 Ohio St. 399; *Ferguson v. Columbus & R. R. R.*, 77 Ga. 102; *Chicago City Railway v. Robinson*, 117 Ill. 1; *Chicago City Railway v. Wilcox*, 138 Ill. 370 (in this case the previous decisions upon this subject, in Illinois, are explained or distinguished, but see § 107, *ante*, n.); *Daube v. Tennison*, 154 Ill. 210; *Louisville Canal Co. v. Murphy*, 9 Bush, 522; *Pennsylvania R. R. v. Kelley*, 3 Penn. St. 372; *Rauch v. Lloyd*, 3 Penn. St. 358; *Glassey v. Hestonville, &c. Railway*, 57 Penn. St. 172; *North Pennsylvania R. R. v. Mahoney*, 57 Penn. St. 187; *Kay v. Pennsylvania R. R.*, 65 Penn. St. 269; *Crissey v. Hestonville, &c. Railway*, 75 Penn. St. 83 (but see *Pennsylvania R. R. v. James*, 81 * Penn. St. 194); *Government Street R. R. v. Hanlon*, 53 Ala. 70; *Birge v. Gardiner*, 19 Conn. 507; *Daley v. Norwich & Worcester R. R.*, 26 Conn. 598; *Bronson v. Southbury*, 37 Conn. 199; *Norfolk & Petersburg R. R. v. Ormsby*, 27 Gratt. 455; *Trumbo v. City Street Car Co.*, 89 Va. 780; *Railway Co. v. Rexroad*, 59 Ark. 180; *Northern Central R. R. v. Price*, 29 Md. 420; *Baltimore City R. R. v. McDonald*, 41 Md. 534; *Whirley v. Whiteman*, 1 Head, 620; *Bottoms v. Seaboard & R. R. R.*, 114 N. C. 699; *Barnes v. Shreveport City R. R.*, 47 La. Ann. 1218; *Boland v. Mississippi R. R.*, 36 Mo. 490; *Isabel v. Hannibal & St. Jo. R. R.*, 60 Mo. 475. In the latter case the rule laid down is put upon the direct application of the ordinary doctrine of proximate cause. See *Gardner v. Grace*, 1 F. & F. 559.

⁵ *Bisaillon v. Blood*, 64 N. H. 565.

guardian permitted him to place himself in a position of danger without a custodian. The rule seems to rest upon the ground that whether or not the child is *sui juris* is not material in determining the question of responsibility, since this must, under the application of the doctrine of proximate cause, always be determined by the acts of the parties at or about the time of the accident. Moreover, it would seem to be evident that the mere fact that an infant is not *sui juris* is not conclusive to show that, 1, he could not be safely trusted to go where he did go or to do what he did do, or, 2, that he did not behave with reasonable prudence in the circumstances in which he was placed. It is apprehended that a child of six years, although not *sui juris*, might safely be trusted to walk to school along a country road, and if he be injured by the act of another while so doing, the only question should be whether he behaved with due care and whether the person injuring him was negligent. So it is apprehended that the question whether the infant is of sufficient capacity to be trusted in the circumstances in which he is placed by the act of his parent or guardian is in reality a question of fact in every case. It is further to be observed that the weight of authority, even in those courts which impute the negligence of the parent or guardian to the child, is in favor of the rule that an infant is capable of negligence, and, conversely, of exercising due care;¹ and it is difficult to perceive the sound reason for a rule which is or is not to be applied according as the infant is or is not under the legal control of another. It appears, however, to be admitted, as a general rule, that, when the parent sues for the loss of the child's services, his own negligence in failing properly to care for the safety of the child will prevent him from recovering; since, in such cases, the negligence of the plaintiff may well be referred to as being the proximate cause of the injury complained of.²

¹ See § 95, *ante*.

² See *Glasse v. Hestonville, &c. Railway*, 57 Penn. St. 172; *Pittsburg, A. & M. Railway v. Pearson*, 72 Penn. St. 169; *Woeckner v. Erie El. Works Co.*, 182 Penn. St. 182; *McCaull v. Bruner*, 91 Iowa, 215; *Northern Central R. R. v. Price*, 29 Md. 420; *Baltimore & Ohio R. R. v. Trainor*, 33 Md. 542; *Norfolk & Petersburg R. R. v. Ormsby*, 27 Gratt. 455; *Jeffersonville, M. & I. R. R. v. Bowen*, 49 Ind. 154; *Hunt*

§ 108 *a.* **Negligence imputed to Representatives of Deceased Person.**— In those cases, founded upon the statute, which are brought by the personal representatives, or next of kin, of a deceased person, to recover damages for the death of such person by the negligence of the defendant, it would seem to be a rule sustained by reason and principle that if the deceased was guilty of contributory negligence in respect of the accident which caused his death, his representative cannot recover.¹ So where the action was brought by a husband to recover for the loss of the services and society of his wife, it was held that if the injury was due to the wife's contributory negligence, this might be imputed to the husband and so preclude him from recovering.² The question is more difficult when the contributory negligence of the persons to be benefited by the action is relied on to defeat it. It has been held, upon a construction of the rule that the contributory negligence of a third party shall not defeat the action,³ that it is not necessary for the representative of the deceased, suing for his death, to negative contributory negligence on his own part, since no negligence is to be imputed in such cases.⁴ But it has also been held, in an action by an administrator, that the contributing negligence of a part of the beneficiaries of the action should be a defence as to them; but not as to those beneficiaries who had not been guilty of such negligence; and that the jury might distribute the statutory damages among the several beneficiaries according to this rule.⁵

v. Geier, 72 Ill. 393; *Bellefontaine & I. R. R. v. Snyder*, 24 Ohio St. 670, 18 Ohio St. 399; *Westbrook v. Mobile & Ohio R. R.*, 66 Miss. 560; *Alabama Great So. R. R. v. Dobbs*, 101 Ala. 219; *Bamberger v. Citizens' Street Railway*, 95 Tenn. 18. It has been held that in an action by husband and wife, for a personal injury to the wife, his contributory negligence will defeat the suit; *Dixon, J., dissenting. Penn. R. R. v. Goodenough*, 55 N. J. L. 577.

¹ *Baltimore & Potomac R. R. v. State*, 75 Md. 152.

² *Chicago, B. & Q. R. R. v. Honey*, 27 U. S. App. 196.

³ See §§ 103, *ante*, 201, *post*.

⁴ *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *Pittsburg, C. C. & St. L. R. R. v. Burton*, 139 Ind. 357.

⁵ *Wolf v. Railway Co.*, 55 Ohio St. 517.

§ 109. **Limitation of the Rule in Cases of Statutory Liability.**—

Where an action for personal injuries is founded upon a statutory liability, the general doctrine of proximate cause has been somewhat qualified in a line of cases in Massachusetts. In actions against municipalities for injuries caused by defects in highways, the liability in that State, and generally elsewhere, is, by the terms of the statute, limited to cases in which the defect is the direct and immediate cause of the injury; and so the general rule that the contributory negligence of a third party will not excuse a defendant whose negligence is, of itself, an efficient cause of the accident, is held not to apply. The statute, generally, creates a specific liability, as against the municipality, for injuries resulting from defects in highways, bridges, etc., directly causing the injury; and if this result from a more remote cause, or from any efficient concurring cause, without which it would not have happened, the defendant municipality is held not responsible. Thus, where a horse, attached to a vehicle, was frightened by reason of the striking of the vehicle against an obstacle, which constituted a defect in a highway, in a city, and ran, and struck a person travelling on foot in the highway, thereby injuring him, it was held that the injured person had no ground for a recovery as against the city, since, although the defect was the efficient, it was not the moving cause of the accident.¹ But, in a case only to be distinguished from that last cited by the fact that the runaway was caused by the negligence of a private person defendant, the action was supported.² The court said: "Statute liability is more narrowly restricted than the rule in the actions at common law for damages caused by negligence, in which it is perfectly well settled that the contributory negligence of a third party is no defence, where the defendant has also been guilty of negligence, without which the damage would not have been sustained." And it is said: "Liability of towns is wholly statutory; and, by the construction given to the statute, no action can be maintained unless the injury arises wholly from the defect."³

¹ *Marble v. Worcester*, 4 Gray, 395.

² *McDonald v. Snelling*, 14 Allen, 290.

³ *Eaton v. Boston & Lowell R. R.*, 11 Allen, 500; and see *Kidder v.*

§ 110. **Questions of Law and Fact.** — As upon the question of negligence generally,¹ so upon the question of proximate cause, the expressions in the authorities are not uniform as to whether this is to be considered as a question of law, or of fact, or as a mixed question of law and fact.² The discussion of the subject does not seem to be important, since it is admitted, generally, that the question whether, in any case, the injury suffered was within the relation of cause and effect legally to be attributed to the alleged wrongful act of the defendant, is, when the facts are in dispute, to be determined by the jury.³ This is often a difficult question, requiring practical knowledge and experience for its determination, and, when there is any evidence to justify the verdict, the conclusion of the jury will not be set aside as bad in law.⁴ If the facts, and the inferences to be drawn therefrom, are not disputed, the question is for the court;⁵ but if the inferences to be drawn from the undisputed facts are not clear, the question is still for the jury.⁶

Dunstable, 7 Gray, 104; *Jenks v. Wilbraham*, 11 Gray, 142; *Richards v. Enfield*, 13 Gray, 344; *Raymond v. Haverhill*, 168 Mass. 382; *Moore v. Abbott*, 32 Maine, 46; *Libbey v. Greenbush*, 20 Maine, 47.

¹ See § 93, *ante*.

² See *Bronson v. Oakes*, 40 U. S. App. 413; *McCauley v. Norcross*, 155 Mass. 584.

³ *Lane v. Atlantic Works*, 111 Mass. 136; *Kreuziger v. Chicago & North-Western R. R.*, 73 Wis. 158; *Lynch v. Brooklyn City R. R.*, 5 N. Y. Sup. N. E. Rep. 311; *McCabe v. Manhattan Railway*, 6 N. Y. Sup. N. E. Rep. 413; *Sweeney v. New York Steam Co.*, 6 N. Y. Sup. N. E. Rep. 528; *Rhing v. Broadway & S. A. Co.*, 53 Hun, 321; *Brown v. Central Pacific R. R.*, 72 Cal. 523.

⁴ *Lane v. Atlantic Works*, 111 Mass. 136. See *Chicago, B. & Q. R. R. v. Spirk*, 51 Neb. 169.

⁵ *Pike v. Grand Trunk Railway*, 39 Fed. Rep. 255; *South Side Passenger R. R. v. Trich*, 117 Penn. St. 390; *Kreuziger v. Chicago & N. W. R. R.*, 73 Wis. 158.

⁶ Thus, in an action against a town for injuries received while driving across a bridge, where it appeared that the bridge fell, that one of the axles of the wagon broke, and that the wagon tipped over, it was held to be a question of fact whether the falling of the bridge caused the axle to break, or whether the tipping over of the wagon by reason of the breaking of the axle, caused the bridge to fall. *Spaulding v. Sherman*, 75 Wis. 77.

CHAPTER IV.

OF NEGLIGENCE ON THE PART OF THE DEFENDANT.

SECTION I.

GENERAL RULES.

§ 111. **Burden of Proof: No Presumption from Occurrence of Accident: Exception.** — In order to support an action for personal injuries, at common law, “two things must concur, . . . the fault of the defendant, and no want of ordinary care on the part of the plaintiff.”¹ And the great weight of authority is in favor of the rule that the burden of proof to establish the fact of negligence on the part of the defendant rests upon the plaintiff and is to be sustained only by the production of positive testimony. It follows that the mere fact of the occurrence of an accident which causes an injury cannot establish, *prima facie*, the fact of negligence,² although it seems to have been held otherwise in a few cases.³ There is,

¹ Per Lord Ellenborough, in *Butterfield v. Forrester*, 11 East, 60.

² *Hammack v. White*, 11 C. B. (N. S.) 588; *Bird v. Great Northern R. R.*, 28 L. J. (N. S.) Exch. 3; *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Allen v. Smith Iron Co.*, 160 Mass. 557; *Carmody v. Boston Gas Light Co.*, 162 Mass. 539; *Clare v. N. Y. & N. E. R. R.*, 167 Mass. 39; *Murphy v. B. & A. R. R.*, 167 Mass. 64; *O’Neal v. O’Connell*, 167 Mass. 388; *Bahr v. Lombard*, 53 N. J. L. 233; *Penn. R. R. v. Middleton*, 57 N. J. L. 154; *Redmond v. Delta Lumber Co.*, 96 Mich. 545; *Joliet Steel Co. v. Shields*, 146 Ill. 603; *Hart v. Washington Park Club*, 158 Ill. 9; *Newry v. Brackenridge Lumber Co.*, 48 La. Ann. 950; *Mary Lee, &c. R. R. v. Chambliss*, 97 Ala. 171.

³ Thus, in a comparatively early case in the Supreme Court of the United States, it was held that the fact that a stage-coach was upset, and the plaintiff injured, was, *prima facie*, evidence of carelessness or negligence on the part of the defendant owner of the coach, and threw upon the defendant the burden of proving that the accident did not occur by

however, a large class of cases which form an apparent, rather than an actual, exception to the general rule, namely, those in which the fact of the occurrence of the accident shows conclusively, or justifies a fair inference, that the accident could not have occurred without preceding negligence on the part of the defendant. In such cases the accident and its incidents are in the nature of positive facts tending to support the burden of proof, which remains, as in all cases, upon the plaintiff.¹ In some of the States, the common-law rule as to the burden of proof has been changed in certain cases in which railway companies are defendants.²

the fault of the driver. *Stokes v. Saltonstall*, 13 Peters, 181 (1839). No cases were cited by the court. So, in Pennsylvania, it was held that, when a passenger is injured without fault on his part, the law raises, *prima facie*, a presumption of negligence on the part of the carrier and throws the burden on him to prove that he was not negligent. It was further held that this presumption might be rebutted by showing that the accident could not have been prevented by human foresight or prudence, being the result of inevitable accident. *Sullivan v. Philadelphia & Reading R. R.*, 30 Penn. St. 234; *Philadelphia & Reading R. R. v. Anderson*, 94 Penn. St. 351. It was held, in the former case, that the fact that the accident whereby the plaintiff was injured was caused by the defendant's train running over a cow unlawfully upon its track was not, of itself, sufficient to repel the presumption of negligence, since it was the defendant's duty to guard against such accidents. See, to the same effect, *Laing v. Colder*, 8 Penn. St. 479, 484. It is held, in Indiana, that there is a presumption of negligence from the fact of the accident. *Louisville, A. & C. R. R. v. Jones*, 108 Ind. 551. See *contra*, *Kuhns v. Wisconsin, I. & N. R. R.*, 70 Iowa, 561. So where the negligence alleged was in the improper construction of a street crossing, and there was no evidence to show the manner of construction, or the kind of material used, it was held error to submit the question of negligence to the jury. *Stein v. Council Bluffs*, 72 Iowa, 180. It has been said, in Georgia, that there is no presumption of negligence from the occurrence of the accident, unless the plaintiff proves that he was without fault. *Western & Atlantic R. R. v. Vandiver*, 85 Ga. 470.

¹ See § 111 *a*, *post*.

² The civil code of Alabama, 1886, § 1147, as amended by the Acts 1887, p. 146, provides that in actions for injuries resulting from failure to comply with § 1444 of the code, which requires signals to be given while running a locomotive within the corporate limits of a city, town, or village, the burden of proof to show such compliance is on the defendant. See *Georgia Pacific R. R. v. Blanton*, 84 Ala. 154. In Mississippi, Rev. Code, 1880, § 1059, it is provided that proof of injury inflicted by cars or

§ 111 *a*. **Negligence presumed — *Res ipsa Loquitur*.** — So far as the maxim *res ipsa loquitur* can be considered as expressing a principle of law, it is an application to a particular class of cases of the general rule that where the evidence of negligence is conclusive, the court may find it as matter of law and direct a verdict accordingly.¹ As the conclusion of law in such cases always involves a determination of fact, it follows that the application of the rule must always depend largely upon the circumstances of the particular case. Thus it is said that there is a *prima facie* presumption of negligence from the occurrence of such an accident as cannot be expected to happen in the ordinary course of things, unless by the negligence of the defendant;² and, again, that whenever it is necessary to introduce extrinsic evidence in order to prove that the defendant was negligent, the doctrine of *res ipsa loquitur* does not apply.³ Generally, the sudden breaking of a piece of machinery is not, of itself, sufficient to justify the conclusion of negligence;⁴ but it may sometimes be inferred that an appliance that gives out while in use is defective.⁵ It

locomotives, while in motion shall be *prima facie* evidence of the want of reasonable skill and care on the part of the railroad company's servants in reference thereto. It is held that this provision is applicable even when the injury sued for resulted from the precedent wrongful act of the injured person. *Vicksburg & M. R. R. v. Phillips*, 64 Miss. 108. In Georgia, by Code, § 3033, it is provided that negligence shall be presumed on the part of a railroad company whenever any person shall be injured by the running of its cars or other machinery. See *Georgia R. R. & Banking Co. v. Nelms*, 83 Ga. 70.

¹ See § 94, *ante*.

² *Minster v. Citizens Railway*, 53 Mo. App. 276; *North Baltimore Pass. Railway v. Kaskell*, 78 Md. 517; *Shafer v. Lacock*, 168 Penn. St. 497.

³ *Hygienic, &c. Co. v. Raleigh & G. R. R.*, 122 N. C. 881.

⁴ *Dobbins v. Brown*, 119 N. Y. 188; *Robinson v. Wright*, 94 Mich. 283; *Sack v. Dolese*, 137 Ill. 129.

⁵ *Reilly v. Campbell*, 20 U. S. App. 334. In *Goll v. Manhattan Railway*, 5 N. Y. Sup. N. E. Rep. 185, it was held that negligence might be inferred from the nature of the accident where the cylinder of an engine on the defendant's elevated railway burst and a fragment of it struck the plaintiff in the street below. Where a knife flew out of a revolving "shaperhead" the first time it was used, the machine being an invention of the defendant, and injured the plaintiff, it was held that this fact had a tendency to show that the machine was dangerous. *Marshall v. Widge-*

is held that mere proof that machinery falls and injures the plaintiff is not sufficient to charge the defendant with negligence.¹ It was held that the fact that a bale of merchandise in the defendant's warehouse fell from a "jigger-hoist" or crane, by which it was being lowered, upon the plaintiff, who was in the defendant's warehouse on business, was sufficient evidence of negligence to go to the jury.² In the same case, it was said: "In an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant the judge in leaving the case to the jury; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." So, the falling of a piece of iron from an elevated railway structure into a highway, by which a traveller is injured, raises the presumption of negligence against the company;³ and so where cross-ties fell from a loaded railway car

comb Furniture Co., 67 Mich. 167, Sherwood, J., dissenting. See *Coleman v. Mechanics Iron Co.*, 168 Mass. 254.

¹ *Dobbins v. Brown*, 119 N. Y. 188.

² *Scott v. London & St. Kath. Docks Co.*, 5 Q. B. 411, 11 L. T. (N. S.) 383, per Channell & Piggott, BB., Pollock, C. B., doubting, and Martin, B., dissenting. But in *Welfare v. Brighton Railway*, L. R. 4 Q. B. 693, it appeared that the plaintiff was lawfully in the defendant's railway station on business when a plank and a roll of zinc fell from the roof of the portico and injured him, a man being seen at the same time on the roof of the portico. It was held, as matter of law, that the action could not be maintained, and Cockburn, C. J., said: "If the question turned upon whether there had been any negligence on the part of the man carrying the zinc, who may perhaps have trodden upon a plank which gave way under him and which caused the plank and zinc to fall, it would be important to ascertain whether the man was the servant of the company, or merely the servant of some contractor," in which case the company, it was said, would not be liable. See *Hammack v. White*, 5 L. T. (N. S.) 676, 31 L. J. C. P. 139; *Byrne v. Boadle*, 9 L. T. (N. S.) 450.

³ *Hogan v. Manhattan Railway*, 149 N. Y. 23; *Ugla v. West End Street Railway*, 160 Mass. 351. So where the defendant dropped a chisel from a building upon the plaintiff passing on the sidewalk. *Dixon v. Pluns*, 98 Cal. 384.

upon the plaintiff who was lawfully walking on a footpath by the track.¹ It is held that the falling of an electric arc lamp, in the absence of explanation, is evidence that it was improperly secured;² and, generally, it being the duty of persons using dangerous appliances on the highway, as electricity, so to manage them as not to injure travellers, the falling of "live" electric wires into a street, caused by the imperfection of appliances, will create the presumption of negligence.³ One who so constructs a building that ice and snow collecting on it will probably fall upon the sidewalk below, is responsible for resulting injuries without further proof of negligence.⁴ The fact of the occurrence of a railway accident will always be evidence, at least, of negligence,⁵ and it has been held that the fact that a passenger is injured while travelling on a train, in the exercise of due care, creates a presumption, as against the railway company,⁶ but it is apprehended that this rule wants at least the qualification that the cause of the injury shall be shown to have been within the control of the defendant.⁷ It

¹ *Howser v. Cumberland & P. R. R.*, 80 Md. 146. So where boards piled on the ground, by the defendant, fell and injured the plaintiff. *McQueen v. Mechanics' Institute*, 107 Cal. 163.

² *Gallagher v. Edison Ill. Co.*, 72 Mo. App. 576.

³ *Western Union Tel. Co. v. State*, 82 Md. 293; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; *Arkansas Telephone Co. v. Ratteree*, 57 Ark. 429. So where the wires were hung so low as to be dangerous to persons passing under them. *Girandi v. Electric Imp. Co.*, 107 Cal. 120.

⁴ *Hannem v. Pence*, 40 Minn. 127. See *Edgerton v. N. Y. Central R. R.*, 39 N. Y. 227; *Mullen v. St. John*, 57 N. Y. 557; *Lyons v. Rosenthal*, 11 Hun, 46; *Kirst v. Milwaukee, L. S. & W. R. R.*, 46 Wis. 486; *Cummings v. National Furnace Co.*, 66 Wis. 603.

⁵ *Bonner v. Grumbach*, 2 Tex. Civ. App. 482; *Texas & Pacific R. R. v. Buckalew*, 3 Tex. Civ. App. 272.

⁶ *Baltimore & Ohio R. R. v. Swann*, 81 Md. 400; *Baltimore City Pass. R. R. v. Nugent*, 86 Md. 349. In Nebraska, and perhaps in other States, the statute makes the occurrence of an injury to a passenger *prima facie* evidence of negligence on the part of the railway company. See *Comp. Sts., Nebraska*, c. 72, art. 1, sec. 3; *St. Joseph & G. I. R. R. v. Hedge*, 44 Neb. 448.

⁷ *Chicago City Railway v. Rood*, 163 Ill. 477 (distinguishing *North Chicago Railway v. Cotton*, 140 Ill. 486); *Dennis v. Pittsburg & C. R. R.*, 165 Penn. St. 624. See *New York, C. & St. L. R. R. v. Blumenthal*, 160 Ill. 40; *Barnowski v. Helson*, (Mich.) 15 L. R. A. 33, and Reporter's

is generally held that the presumption of negligence arises from the occurrence of a collision of railway trains,¹ or between a street car and a steam railway car.² Stopping or starting a car so suddenly as to injure a passenger has been held to be, *prima facie*, negligence;³ and so is the derailment of a passenger train, no extrinsic cause of the accident appearing.⁴ It has been held that the sudden giving way of a railway track might be *prima facie* evidence of negligence on the part of the defendant company which was bound to keep the track in repair.⁵ And it is said: "There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it."⁶

§ 112. Violation of Statute Regulation by Defendant. — When it appears that the violation by the defendant of a statute,

note. The happening of an accident to a passenger in a street car, if this is connected with the apparatus of transportation, raises a presumption of negligence on the part of the company. *Clow v. Pittsburg Traction Co.*, 158 Penn. St. 410.

¹ *West Chicago Street R. R. v. Martin*, 154 Ill. 523; *North Chicago Street R. R. v. Cotton*, 140 Ill. 486; *Iron R. R. v. Maury*, 36 Ohio, 418; *Skinner v. Railway Co.*, 5 Exch. 787; *Kinney v. North Carolina R. R.*, 122 N. C. 961; *Galveston, H. & San A. R. R. v. Parsley*, 6 Tex. Civ. App. 150. See Code, Miss., § 1059, and *Short v. N. O. & Northeastern R. R.*, 69 Miss. 848. The failure of electric bells at a grade crossing of a railway to ring at the approach of a train is evidence of the negligence of the railroad in an action against it for injuries caused by a collision with the train at the crossing. *Hicks v. New York, N. H. & H. R. R.*, 164 Mass. 424.

² *Railway Company v. Harrell*, 58 Ark. 454. So the occurrence of a rear-end collision of cable-cars. *North Chic. St. Railway v. Cotton*, 140 Ill. 486.

³ *Cons. Traction Co. v. Thalheimer*, 59 N. J. L. 474; *Guffey v. Hannibal & St. Jo. R. R.*, 53 Mo. App. 462.

⁴ *Albion Lumber Co. v. DeNobra*, 44 U. S. App. 347; *Railway Company v. Mitchell*, 57 Ark. 418; *Reed v. Northeastern R. R.*, 37 S. C. 42. In *Och v. Missouri, K. & P. R. R.*, 130 Mo. 27, negligence was presumed from the fall of a ventilating window in a railway car.

⁵ *Storher v. St. Louis, I. M. & So. R. R.*, 91 Mo. 509.

⁶ *Great Western Railway v. Braid*, 1 Moore, P. C. (N. S.) 101. But see *Withers v. North Kent Railway*, 27 L. J. (N. S.) Exch. 417.

ordinance, or municipal regulation was a contributing cause to produce the injury complained of, then such statute, ordinance, or regulation is competent evidence tending to charge the defendant with negligence.¹ But such evidence is incompetent, as being immaterial, if the violation of the statute by the defendant did not contribute to produce the injury.² And the fact of the violation of the statute will not be conclusive to establish the defendant's negligence unless it be clear that but for it the accident could not have happened.³ Thus in the case of injury to persons, alleged to be by reason of the failure of a railroad company to fence its track in compliance with a valid ordinance requiring it so to do, it was held that the default of the company was evidence of its negligence but not conclusive of its liability.⁴ So the failure of a railroad company to give the signals required by law upon its train approaching a crossing will not sustain an action for damages in behalf of a plaintiff who would not have been injured by the failure of duty on the part of the railroad but for his own want of care.⁵ Conversely, the mere giving of the signals required by law under such circumstances will not relieve the defendant corporation from the imputation of negligence, if in fact it was negligent in other respects, as by running its

¹ *Wright v. Malden & Melrose R. R.*, 4 Allen, 283; *Lane v. Atlantic Works*, 111 Mass. 136; *Graham v. Manhattan Railway*, 149 N. Y. 336. See *Lake Erie, &c. R. R. v. Craig*, 37 U. S. App. 654.

² *Wakefield v. Conn. & Pass. R. R.*, 37 Vt. 330; *Steves v. Oswego & Syracuse R. R.*, 18 N. Y. 422, 425; *Brooks v. Buffalo & Niagara Falls R. R.*, 25 Barb. 600; *Dascomb v. Buffalo & State Line R. R.*, 27 Barb. 221; *Evans v. American Iron & Tube Co.*, 43 Fed. Rep. 519.

³ *Clark v. Boston & Maine R. R.*, 64 N. H. 323; *Nutter v. Boston & Maine R. R.*, 60 N. H. 483; *Kwiatowski v. Grand Trunk R. R.*, 70 Mich. 549; *Yancey v. Wabash, St. L. & P. R. R.*, 93 Mo. 433; *Omaha, N. & B. H. R. R. v. O'Donnell*, 22 Neb. 475.

⁴ *Hayes v. Michigan Central R. R.*, 111 U. S. 228.

⁵ *Wakefield v. Conn. & Pass. R. R.*, 37 Vt. 330; *Dascomb v. Buffalo & State Line R. R.*, 27 Barb. 221; *Steves v. Oswego & Syracuse R. R.*, 18 N. Y. 422; *Omaha, N. & B. H. R. R. v. O'Donnell*, 22 Neb. 475; *Hagar v. South Pac. Co.*, 98 Cal. 309; *Herbert v. South Pac. Co.*, 121 Cal. 227. See, apparently *contra*, *Huckshold v. St. Louis, Iron Mt. & S. R. R.*, 90 Mo. 548; *Murray v. Missouri Pac. R. R.*, 101 Mo. 236; *Giles v. Diamond State Iron Co.*, 8 Atl. Rep. 368 (Del. 1887).

train at a dangerous rate of speed under the circumstances of the case.¹ The fact that the defendant's failure of duty consists in the violation of a statute will not relieve the plaintiff from the obligation of showing that he was in the exercise of due care.² Thus the violation, by the employer, of a statute³

¹ *Thompson v. New York Cent. & H. R. R. R.*, 110 N. Y. 636. It was held in *Van Norden v. Robinson*, 45 Hun, 567, that to navigate a steamboat with a boiler not inspected as required by statute, was to maintain a nuisance, and raised the presumption that the omission caused the explosion of the boiler, though there was no evidence of actual negligence on the part of the defendant. So it has been held that the failure of the owner of a building to comply with a statute which required that elevator openings should be provided with guards "as may be directed and approved by the superintendent of buildings, and such trap-doors shall be kept closed at all times except when in actual use," whereby injury results, is *prima facie* evidence of negligence, no direction or approval having been obtained, when the premises have been in the same condition for several years. *McRickard v. Flint*, 114 N. Y. 222. Although it is generally admitted that the mere failure on the part of a railway company to ring its bell or blow its whistle, on approaching a crossing, is not, as matter of law, negligence, see *Farve v. Louisville & Nashville R. R.*, 42 Fed. Rep. 441; *International & Great Northern R. R. v. McDonald*, 75 Tex. 41; *Houston & T. C. R. R. v. Brin*, 77 Tex. 174, yet there are cases which hold that the failure to give such signals, these being required by statute, is negligence *per se*. See *Wall v. Delaware, L. & W. R. R.*, 54 Hun, 454; *Bitner v. Utah Central R. R.*, 4 Utah, 502. So although it is held that, in the absence of a statute regulating the rate at which trains may be run, the question is for the jury whether a train is negligently run (see § 122, and cases cited), it was held that running a train at greater than the statutory rate of speed was negligence *per se*. *Keim v. Union Railway & Transit Co.*, 92 Mo. 314; *Piper v. Milwaukee & St. P. R. R.*, 77 Wis. 247; and see *Hooker v. Chicago, M. & St. P. R. R.*, 76 Wis. 542; *Gulf, C. & S. F. R. R. v. Breitling*, 12 S. W. Rep. 1121 (Tex. 1890); *South & North Alabama R. R. v. Donovan*, 84 Ala. 141. But the better opinion is that the mere running a train at a rate of speed prohibited by the statute is evidence of negligence merely. *Clark v. Boston & Maine R. R.*, 64 N. H. 323; *Northern Central R. R. v. Herchiskel*, 38 U. S. App. 659. It has been held that failure to observe a statute requiring persons engaged in blasting rocks to give seasonable notice before each explosion is negligence *per se*, and renders the negligent party liable for the injurious results of such explosion. *Wadsworth v. Marshall*, 88 Maine, 263.

² *Taylor v. Carew Manufg Co.*, 143 Mass. 470; *Nosler v. Chicago*,

³ *Laws of N. Y. 1890, c. 398, § 12.*

requiring cogs in factories to be properly guarded does not render the employers liable for an injury to an employee by coming in contact with unguarded cogs, when the danger was obvious and the employee assumed the risk of it.¹ The converse of the general rule is well stated in a case in which it was held that, in an action against a railroad company for injuries resulting from its negligence in not constructing or maintaining a sufficient crossing as required by law, the defendant can be relieved of liability only by showing that the crossing was constructed in strict compliance with the statute; that it has always been maintained in a safe condition; and that it is located in that part of the street that is graded, and usually travelled by vehicles; or that the failure to do any of these things was not the direct cause of the injury; or that the accident was the result of the negligence of the person injured; or that it was the result of the negligence of neither; or when the plaintiff, upon whom the burden of proof rests, fails to show by a preponderance of evidence that the defendant has failed to perform its duty in some respect.² A local ordinance giving street-railway cars a right of way as against other vehicles does not justify the driver of such a car in running down a vehicle which cannot get out of the way.³

SECTION II.

OF CARRIERS OF PASSENGERS.

§ 113. **General Rule of Liability.** — While a common carrier of merchandise is bound by an implied contract of warranty Burlington & Q. R. R., 73 Iowa, 268; Ryall v. Central Pacific R. R., 76 Cal. 474; Hudson v. Wabash W. R. R., 101 Mo. 13. See also the large class of actions brought for injuries received by reason of defective highways, in which it is held that the plaintiff is bound, in order to recover, to show that he was himself in the exercise of due care, whether or not the action is grounded in a common-law right or solely upon the statute.

¹ E. S. Higgins Carpet Co. v. O'Keefe, 51 U. S. App. 74.

² Hogue v. Chicago & Alton R. R., 32 Fed. Rep. 365. See McKelvy v. Burlington, C. R. & N. R. R., 84 Iowa, 455.

³ Lalthen v. Fort Wayne, &c. Railway, 100 Mich. 297. See also Connor v. Electric Traction Co., 173 Penn. St. 602.

to be responsible for all loss occurring to the goods entrusted to him, while these remain in his custody as carrier, except such loss as results from the act of God or of the public enemy; the carrier of passengers for hire does not warrant the safety of his passengers,¹ and his liability for injuries received by them in the course of the transportation is founded upon the negligence of the carrier in respect of his duty; and this is so whether his failure of duty be referred to a breach on his part of the contract of transportation, or to a violation of the public duty which, as a carrier, he owes to the public.² This rule is supported by the uniform tenor of the American and the weight of the English authorities.³ In an early English case, it was said that "there was a difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking, as to them, went no further than this: that as far as human foresight could go, he would be answerable for their safety."⁴ If this expression is to be taken as laying down

¹ "Carriers of passengers for hire are not responsible, in all particulars, like common carriers of goods. They are not insurers of the personal safety against all contingencies, except those arising from the act of God or the public enemy. For an injury happening to the person of a passenger by a mere accident, without fault on their part, they are not responsible; but are liable only for want of due care, diligence, and skill." *Bennett v. Dutton*, 10 N. H. 481. See *New Jersey Traction Co. v. Gardner*, 58 N. J. L. 176; *McGrell v. Buffalo O. B. Co.*, 153 N. Y. 265.

² See § 3, *ante*.

³ *Camden & Amboy R. R. v. Burke*, 13 Wend. 626; *Hollister v. Newton*, 19 Wend. 236; *Boyce v. Anderson*, 2 Pet. 155; *Stokes v. Saltonstall*, 13 Pet. 181; *Ingalls v. Bills*, 9 Met. 1. There are several English cases in which the doctrine is intimated, either directly or in *dicta*, that the proprietor of a public vehicle is a warrantor of the safety of his passengers, and so liable for injuries resulting from hidden defects, or weaknesses, which the utmost diligence could not have discovered. See *Israel v. Clark*, 4 Esp. 259 (1803); *Bremner v. Williams*, 1 C. & P. 414 (1824); *Crofts v. Waterhouse*, 3 Bing. 321 (1825); *Sharp v. Grey*, 9 Bing. 457. In respect of these cases it is said that if they do "uphold the doctrine for which they are cited, they are certainly so much in conflict with other decided cases, that they cannot be viewed in the light of decided authorities." See *Ingalls v. Bills*, 9 Met. 1, 7.

⁴ *Christie v. Griggs*, 2 Camp. 79, and see *Aston v. Hewen*, 2 Esp. 533.

the rule that the carrier is bound to exercise the highest degree of care in the conduct of his business of which the human mind can conceive, it states the doctrine of liability far too broadly, although like expressions occur in several cases.¹ The rule upon this subject has been stated in the Supreme Court of the United States, as follows: 1. A carrier of passengers for hire is bound to observe the utmost caution characteristic of a very careful, prudent man. 2. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise, upon his part, of extraordinary vigilance aided by the highest skill. 3. Such caution and diligence extends to all the appliances and means used by the carrier in the transportation of the passenger. 4. He must provide cars or vehicles adequate, that is, sufficiently secure as to strength or other requisites, for the safe conveyance of passengers, and for the slightest negligence or fault in that regard, from which injury results to the passenger, the carrier is liable.² Stated briefly, the rule is that the carrier is bound to use the utmost care and diligence in the transportation of passengers consistent with the carrying on of his business.³ This obligation includes that of providing prudent and competent servants and agents to conduct the business.⁴ When the accident is caused by some hidden defect in the machinery of transportation, which the most vigilant oversight and inspection could not discover, the injury falls within that class for which the law can afford no redress in the form of damages.⁵ And the

¹ See *Stokes v. Saltonstall*, 13 Pet. 181; *Louisville & Nashville R. R. v. Ritter*, 85 Ky. 368.

² *Pennsylvania Company v. Roy*, 102 U. S. 451, per Harlan, J., and see *The New World v. King*, 16 How. 469; *Burton v. West Jersey Ferry*, 114 U. S. 474; *Race v. Union Ferry Co.*, 138 N. Y. 644. For further authorities applied to the liability of railway carriers, see §§ 118-124, *post*.

³ The carrier is bound to use "the highest degree of care which a reasonable man would use." *Dewort v. Lormer*, 21 Conn. 245.

⁴ *Ingalls v. Bills*, 9 Met. 1; *Warren v. Fitchburg R. R.*, 8 Allen, 227.

⁵ *Ingalls v. Bills*, 9 Met. 1; *McElroy v. Nashua & Lowell R. R.*, 4 Cush. 400; *Schropman v. Boston & Worcester R. R.*, 9 Cush. 24. The carrier is not bound to anticipate the happening of that which never happened before, and which would not occur to a prudent man as likely

carrier is not bound to provide against casualties never before known, and not reasonably to be expected; as where a runaway horse breaks through the gates at a railway crossing, runs upon the station platform and comes into collision with a passenger there waiting for a train;¹ hence his duty is not to be estimated by what, after an accident, then first appears to be a proper precaution against a recurrence of it.² It is the

to happen. Thus, where a passenger slipped under the gangway-rail of a steamboat and was drowned, and it appeared that all the steamboats on the defendant's line were constructed in the same way, and had been run for many years, and that no like accident had before occurred, it was held that there was no proof that the danger ought to have been anticipated, and nothing in the case to charge the defendant with negligence. *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1. For a similar case see *Loftus v. Union Ferry Co.*, 84 N. Y. 455, and for an extreme application of the rule, *Crafter v. Metropolitan R. R., L. R. 1 C. P. 300*. If, however, the proximate cause of the injury is a clearly negligent act on the part of the defendant or its servants, the defendant will not be relieved from liability because the accident was one which would not ordinarily be expected to follow the act. Thus it being held negligence for the servants of a railroad to leave a coupling-pin unsecured upon the platform of a moving car, it was further held that the fact that the accident which resulted from the leaving of the pin was extraordinary and not to be anticipated did not relieve the defendant from its liability therefor. *Doyle v. Chicago, St. Paul & Kansas City R. R.*, 77 Iowa, 607, and see *Clifford v. Denver, St. P. & P. R. R.*, 9 Col. 333.

¹ *Brooks v. Old Colony R. R.*, 168 Mass. 164.

² § 38, *ante*, and cases cited; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306. See also *Wyckoff v. Queen's County Ferry Co.*, 52 N. Y. 32; *Crocheron v. North Shore Staten Island Ferry Co.*, 56 N. Y. 656. On the other hand, it is held that the mere fact that an accident is so extraordinary that it could not reasonably have been anticipated, does not relieve the defendant from responsibility for his negligence. *Doyle v. Chicago, St. Paul & K. C. R. R.*, 77 Iowa, 607. See also, *Maher v. Manhattan Railway*, 53 Hun, 506; *Chicago, Milwaukee & St. P. R. R. v. Harper*, 128 Ill. 384. It is held that persons using elevators for the purpose of lifting persons to the upper stories of buildings are carriers of passengers, and that the same rule of care is applicable to them as to ordinary passenger carriers, and so that they are bound to provide the best means and appliances which are reasonably practicable, *Goodsell v. Taylor*, 41 Minn. 207; *Treadwell v. Whittier*, 80 Cal. 565, and to operate these prudently. *Mitchell v. Marker*, 22 U. S. App. 325. But the owner is not the insurer of the safety of a passenger elevator. *McGrell v. Buffalo O. B. Co.*, 153 N. Y. 265. See *People's Bank v. Morgolofski*, 75

duty of the carrier and his servants to use vigilance in maintaining order and in protecting passengers from violence or insult, whether from the employees of the carrier, or from other passengers; and a failure of duty in this respect will render the carrier liable for injuries to passengers caused thereby.¹ And to this end, the carrier may repress and prohibit all disorderly conduct in its vehicles, and expel or exclude therefrom any intoxicated person, or person whose conduct or condition is such as to render acts of impropriety, rudeness, indecency, or disturbance, on his part, either inevitable or probable.² But it is apprehended that the carrier is not bound to protect its passengers against mere rudeness or bad manners on the part of fellow passengers or strangers.³

§ 114. **Who are Passengers.** — Although, as between the carrier and the passenger, the contract for transportation is complete when the sale of the ticket is made, it does not follow that the relation of passenger and carrier, and the full responsibility of the latter, then begins; since the purchaser may

Md. 432; *Hartford Dep. Co. v. Sollitt*, 172 Ill. 222. As to his servant using the elevator, the owner of it does not stand in the relation of carrier. *McDonough v. Lanpher*, 55 Minn. 501.

¹ *Meyer v. St. Louis, I. M. & So. Railway*, 4 C. C. A. 221; *Spohn v. Missouri Pacific R. R.*, 87 Mo. 74; *Flint v. Norwich & N. Y. Trans. Co.*, 34 Conn. 554; *Putnam v. Broadway & Seventh Ave. R. R.*, 55 N. Y. 108; *Mullan v. Wisconsin Central R. R.*, 46 Minn. 474; *Goddard v. Grand Trunk R. R.*, 57 Maine 202; *Shorley v. Billings*, 8 Bush, 147; *Stewart v. Brooklyn & Crosstown R. R.*, 90 N. Y. 588; *Chicago & Eastern R. R. v. Flexman*, 103 Ill. 546; *King v. Ohio & M. R. R.*, 22 Fed. Rep. 413; *New Orleans, St. L. & C. R. R. v. Burke*, 53 Miss. 200.

² *Vinton v. Middlesex R. R.*, 11 Allen, 304, and see *Murphy v. Union Railway*, 118 Mass. 228. It is held that the servants of a railroad may lawfully eject from its train one evidently suffering from an infectious disease, as small-pox. *Paddock v. Atchison, T. & S. F. R. R.*, 37 Fed. Rep. 841. Where an insane passenger shot another passenger, the railroad having reason to know that he was dangerous, it was held highest degree of care was imposed on the railroad; including that of physical restraint, although it need not necessarily be foreseen that a homicide would take place without such restraint. *Meyer v. St. Louis, I. M. & S. R. R.*, 4 C. C. A. 221.

³ *Ellinger v. Wilmington & Balt. R. R.*, 153 Penn. St. 213; *Graeff v. Phil. & R. R. R.*, 161 Penn. St. 230.

buy his ticket in advance of the time at which he intends to use it, or at an office which is not in the same town, or State, in which he intends to take the cars. The relation of carrier and passenger begins only when the holder of the ticket puts himself in charge of the carrier for the purpose of being conveyed to his destination.¹ But if he is passing from the office or place of business of the company, where he purchased his ticket, to his seat in the cars, on the premises belonging to the company; and connected with the railroad, and under the direction, express or implied, of the agents of the railroad, given to him as to a passenger with whom the railroad has made a contract for conveyance; he is, while so passing to the train, a passenger, and, as such, entitled to a safe opportunity to enter the cars at the proper time.² Whenever the performance of the contract of carriage in a usual and proper way involves, on the part of the passenger, the reasonable necessity

¹ Thus, one who embarks upon a passenger steamboat with the intention of taking passage thereon, thereby becomes a passenger, although his passage-money has not been paid. *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306, and see *Frink v. Schroyer*, 18 Ill. 416. It has been held that one who, without the knowledge of any of the trainmen, endeavors to board a train which has stopped to discharge passengers at a station where it does not customarily stop to receive them, does not thereby become a passenger, although he has purchased a ticket and supposes the train to be the one which he had intended to take, and although the railroad had customarily permitted passengers to take such train. *Jones v. Boston & Maine R. R.*, 163 Mass. 245. But see *Lewis v. Del. & H. Canal Co.*, 145 N. Y. 508, as cited, *post*. One who obtains a passage ticket from an agent, on his promise to pay for it on his return, there not being time to pay for it before the starting of the train, and does so pay for it, is to be treated as a passenger in an action for ejectment from the train. *Ellsworth v. Chicago B. & Q. R. R.*, 95 Iowa, 98.

² *Warren v. Fitchburg R. R.*, 8 Allen, 227, and see *Snow v. Fitchburg R. R.*, 136 Mass. 552. In *Webster v. Fitchburg R. R.*, 161 Mass. 298, it was held that a person while running very rapidly across the premises of a railroad outside the passenger station and across a track to take a train on the farther track, and who is struck by a train moving on the nearer track, is not a passenger although he has upon his person a ticket which entitles him to transportation on the train which he is attempting to reach. The decision seems to rest on the ground that the contract of carriage implies that in order to make the ticket-holder a passenger, "he must be in a proper condition and present himself in a proper manner."

of leaving the vehicle and returning to it, as for the purpose of obtaining refreshment, the passenger is entitled to protection as such while leaving, for such purpose, and returning to, the vehicle in which he is making his journey.¹ A passenger upon a railway car continues to be such while rightfully leaving the car, and the station at which it has stopped.² But one who has alighted from a car and, after the train has passed on, starts away from the station over an adjacent crossing of a highway at grade, ceases to be a passenger,³ and so one who steps from a street car to the street is no longer a passenger but a traveller on the highway,⁴ and he has no right to expect that the street, where he alights, shall be in a safe condition.⁵ So, a person walking towards a railway station with the intention of buying a ticket and taking a train after he gets there, is not a passenger before he reaches the station, even although he might be one, in the same place, after he had begun his journey.⁶ It is obvious where a steam railroad

¹ *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 207; *Jeffersonville, Madison & Indianapolis R. R. v. Riley*, 39 Ind. 568; *Peniston v. Chicago, St. Louis & N. O. R. R.*, 34 La. Ann. 777.

² *McKimble v. Boston & Maine R. R.*, 139 Mass. 542. In this case it was held that if a passenger on a railroad car has in his possession a ticket good from one station to another, leaves the car at an intermediate station, not having had an opportunity to surrender his ticket or pay his fare, it cannot be said, as matter of law, in an action against the railroad for negligently causing his death, that he was not riding upon the ticket which he held, or that he intended to evade payment of his fare, or left the car for that purpose.

³ *Allerton v. Boston & Maine R. R.*, 146 Mass. 241.

⁴ *Creamer v. West End Street Railway*, 156 Mass. 320.

⁵ *Bigelow v. West End Street Railway*, 161 Mass. 393.

⁶ *June v. Boston & Albany R. R.*, 153 Mass. 79. One who remains in a railway station after he has ascertained that the train which he intended to take has gone, is, at best, a mere licensee, and cannot recover for injuries sustained in leaving the station by reason of the act of the station-master in extinguishing the lights at the usual time of closing the station for the night. *Heinlein v. Boston & Providence R. R.*, 147 Mass. 136. See also *Pittsburg, Fort Wayne & Chicago R. R. v. Bingham*, 29 Ohio St. 364. But where the plaintiff went to the railroad station to meet his wife, and having occasion to seek a retired spot, no special resort being provided, he stepped off the walk in the darkness within the depot grounds, fell into a hole and was injured, it was held that he was a customer of

does not require the party to purchase a ticket before boarding his train, but customarily accepts cash fares, that one is a passenger who presents himself for transportation able and intending to pay in cash for his passage.¹ One who goes to a flag station of a railroad where there is no ticket-office, for the purpose of boarding a train, is, upon properly signifying his intention to get upon a passenger train which has stopped at the station, entitled to the rights of a passenger.² The fact that a passenger has taken passage on a train which does not stop at the station where he desires to get off does not affect the duty of the railway company to protect him against the negligent acts of its servants; he being entitled to the same measure of protection as other passengers.³ Where one evades his fare as by falsely representing that he is without money, whereby he is permitted to remain on the train, the relation of carrier and passenger is not established as between him and the railway company.⁴ So, after a refusal by a person to pay the legal fare demanded by the conductor, there is

the defendant, and that he could maintain his action for the injury. *McKone v. Mich. Central R. R.*, 51 Mich. 601. Where a woman went to a railway station in a town where she was temporarily residing in order to procure a time table in order to see if there was change in the train schedules, and while passing along the platform was injured by an object thrown from a passing express train, it was held that the jury might properly conclude that she was present on the platform by the implied invitation of the railroad. *Bradford v. Boston & Maine R. R.*, 160 Mass. 392. See *Carpenter v. B. & A. R. R.*, 97 N. Y. 494; *Toledo, W. & W. R. R. v. Maine*, 67 Ill. 298. A person lawfully and necessarily upon the station grounds of a railroad for the purpose of receiving mail and express matter from a train is entitled to the same protection as one intending to take passage on the train. *Tubbs v. Mich. Cent. R. R.*, 107 Mich. 108. See § 157, *post*. Where one enters a railway train in order to help an infirm passenger to get a seat, and is injured in getting off by reason of the starting of the train, the railroad will be held to have owed him ordinary care, it having notice of his intention to leave the train; but if it had not notice, it will not owe him any duty. *Int. & Great North. R. R. v. Satterwhite*, 15 Tex. Co. App. 102.

¹ See *Inness v. Boston, Revere Beach & L. R. R.*, 168 Mass. 433; *Northern Pacific R. R. v. Panson*, 44 U. S. App. 178.

² *Western & Atlantic R. R. v. Voils*, 98 Ga. 448.

³ *Lewis v. Del. & H. Canal Co.*, 145 N. Y. 508.

⁴ *Condran v. Chicago, M. & St. P. R. R.*, 32 U. S. App. 182.

no contract which requires that such person shall be carried to the next station under a rule of the company; and the servants of the company may lawfully eject such person from the train and use reasonable force in so doing.¹ One who tenders the legal fare to the conductor of a passenger train, and is ejected because of his refusal to pay the customary fare, which is in excess of the legal fare, may recover for the injuries sustained by him by reason of his ejection.²

§ 115. **Person conveyed gratuitously may be a Passenger.** — One whom a passenger carrier undertakes to convey gratuitously, in a vehicle intended and used for the transportation of passengers, is a passenger, and may recover, in like manner as other passengers, for injuries received by him by reason of the carrier's negligence.³ And a railroad corporation has been held liable for injuries occasioned through the negligence of its servants to a stockholder of the corporation riding at the president's invitation, free, and not in the usual passenger car.⁴ It seems that if the injured person entered the vehicle, not as a passenger for hire but upon the invitation of the employee in charge of the vehicle, although the

¹ *Moore v. Columbia R. R.*, 38 S. C. 1.

² *Chamberlain v. Lake Shore & M. S. R. R.*, 110 Mich. 614.

³ *Nolton v. Western R. R.*, 15 N. Y. 444; *Todd v. Old Colony & Fall River R. R.*, 3 Allen, 18; *Littlejohn v. Fitchburg R. R.*, 148 Mass. 478; *Hurt v. Southern R. R.*, 41 Miss. 391; *Head v. Georgia Pacific Railway*, 79 Ga. 358. Where a defendant railroad company owned a bridge over which it ran trains, and alongside of the track was a passway for vehicles and pedestrians to travel over on payment of a toll, and the defendant's employee was injured by reason of an alleged defect in such passway: it was held that the fact that the plaintiff had a free pass to use the bridge did not bar him from a recovery. *Pembroke v. Hannibal & St. Jo. R. R.*, 32 Mo. App. 61. In an action against a street-railway company, for injuries, it appeared that the plaintiff accompanied her daughter into the defendant's car, and that the daughter told the conductor that the plaintiff was not a passenger; that the plaintiff turned and proceeded to leave the car, when the conductor started the car, thereby throwing the plaintiff to the ground and injuring her. It was held that the question of the defendant's negligence was for the jury. *Rott v. Forty-second St. &c. R. R.*, 1 N. Y. Supp. N. E. Rep. 518 (1888). See *Suber v. Ga., Car. & N. R. R.*, 96 Ga. 42.

⁴ *Philadelphia & Reading R. R. v. Derby*, 14 How. 468.

invitation were given without express authority, the corporation may be liable for the injury in the absence of any collusion between the employee and the injured person to defraud the corporation.¹ And where a railroad company holds out its employees as authorized to consent to a person's being carried on its trains with cattle shipped by him over its line, and such employees consent, although in violation of the rules of the company, such consent is equivalent to the consent of the company itself.² But it is held that one who rides, by invitation of an employee, upon a vehicle not intended for the transportation of passengers, as upon a locomotive attached to a freight train or upon a hand-car, upon a railway used only for the transportation of freight, does not become a passenger, even if he and other persons have customarily so ridden.³ The rule of law in these cases would seem to rest upon the consideration that the liability of the carrier is founded upon the public duty with which the law charges him to convey his passengers safely, since his liability in this respect may exist whether or not there is an existing contract for transportation between him and the passenger.⁴ Persons who are permitted to travel on the trains of a railroad corporation, without payment of fare, for the purpose of vending newspapers and periodicals for profit and for the convenience of the passengers, are not servants of the corporation, but passengers, and entitled to protection as such.⁵ It is

¹ *Wilton v. Middlesex R. R.*, 107 Mass. 108. See *Flint & Pere Marquette R. R. v. Weir*, 37 Mich. 111, 114, 115; *Austin v. Great Western Railway*, L. R. 2 Q. B. 442, 445; *Danbeck v. N. J. Traction Co.*, 57 N. J. L. 463.

² *New Orleans & N. E. R. R. v. Thomas*, 23 U. S. App. 37, and see *New York, C. & St. L. R. R. v. Blumenthal*, 160 Ill. 40.

³ *Files v. Boston & Albany R. R.*, 149 Mass. 204; *Stanley v. Durham & N. R. R.*, 120 N. C. 514; *Woolsey v. Chic. B. & Q. R. R.*, 39 Neb. 798.

⁴ See §§ 3, 5, *ante*. Where a passenger is carried gratuitously the liability of the carrier for an injury caused by gross negligence arises not from any implied contract, but from a violation of a duty imposed by the circumstances. Per *Selden, J.*, in *Nolton v. Western R. R.*, 15 N. Y. 444. See also *Head v. Georgia Pacific Railway*, 79 Ga. 358. See § 116, *post*.

⁵ *Commonwealth v. Vermont & Mass. R. R.*, 108 Mass. 7. See § 117, *post*.

generally held that a railway mail clerk, travelling upon a railway in the service of the United States is a passenger for hire in so far as the railway company's liability for injuries is concerned.¹

(a) *Right of the Carrier to limit his Responsibility by Contract.*

§ 116. **Generally, cannot avoid its Liability : Contrary Authority.** — In the United States, the weight of authority is in favor of the rule that, as to passengers for hire, the stipulation by a common carrier that he will not be liable for damages in case of injury to the passenger, will not relieve him from responsibility for the results of the negligence of himself and his servants.² This rule is made to rest upon the considerations: (1) That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law;³ (2) That it is not just and reasonable for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; (3) That these rules apply both to common carriers of goods and common carriers of passengers, and with especial

¹ *Arrowsmith v. Nashville & D. R. R.*, 57 Fed. Rep. 165; *Libby v. Maine Central R. R.*, 85 Maine, 34; *Blair v. Erie Railway*, 66 N. Y. 313; *Baltimore & Ohio R. R. v. State*, 72 Md. 36; *Norfolk & Western R. R. v. Shott*, 92 Va. 34. But see *Price v. Penn. R. R.*, 113 U. S. 218.

² *Philadelphia & Reading R. R. v. Derby*, 14 How. 468; *Atlantic & Pacific R. R. v. Laird*, 58 Fed. Rep. 760, 7 C. C. A. 489; *Waterbury v. N. Y. C. & H. R. R. R.*, 17 Fed. Rep. 671; *Pennsylvania R. R. v. Butler*, 57 Penn. St. 335; *Pennsylvania R. R. v. Henderson*, 51 Penn. St. 315; *Flinn v. Philadelphia, W. & B. R. R.*, 1 Houst. (Del.) 469; *Jacobus v. St. P. & Chicago R. R.*, 20 Minn. 125; *Ross v. Des Moines Valley R. R.*, 39 Iowa, 246; *Pennsylvania R. R. v. Woodworth*, 26 Ohio St. 585.

³ *New York Central R. R. v. Lockwood*, 17 Wall. 357. As to the application of the general rule to carriers of merchandise or baggage, see in the United States, *Hall v. Cheney*, 36 N. H. 26; *Sager v. Portsmouth, S. & P. R. R.*, 31 Maine, 228; *Jones v. Voorhes*, 10 Ohio, 145; *Camden & Amboy R. R. v. Burke*, 13 Wend. 611; *Cole v. Goodwin*, 19 Wend. 281; *Clark v. Faxton*, 21 Wend. 153; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344. As to the less stringent rule adopted in England and by the courts of New York, see *Simons v. Great Western Railway*, 18 C. B. 805, and other cases cited *infra*.

force to the latter. In the same case, after reviewing the American and English decisions upon the subject, Bradley, J., said: "It seems to us . . . that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary . . . without changing the character of the employment. . . . It is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants. . . . If we advert . . . to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. . . . In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. . . . It is obvious . . . that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms."¹ In other words, such a stipulation is to be taken as void, as being against public policy.² So, it is held that a railway corporation cannot limit its liability to its passengers for injuries received by them by a mere disclaimer, as by printing on the back of its season tickets these words: "The corporation assumes no liability for any personal injury received while in a train to any season-ticket holder."³ It seems, however, that now, in England, a common carrier may limit his liability by any special contract and that the courts will not pass upon the question whether such contract is reasonable or unreasonable.⁴ This view of the law

¹ New York Central R. R. v. Lockwood, 17 Wall. 357.

² Davis v. Chic., M. & St. P. R. R., 93 Wis. 470.

³ Commonwealth v. Vermont & Massachusetts R. R., 108 Mass. 7. In Bates v. Old Colony R. R., 147 Mass. 255, it was held, if an express messenger, holding a season ticket and desiring to ride, in the baggage car, where the defendant is not bound to carry him, agrees to assume all risk of injury in consideration of being permitted to ride there, that the agreement was not invalid as being against public policy. See § 117, *post*.

⁴ Thus, a steamship company issued a passenger ticket containing the condition that "the company will not be responsible for any delay arising from the perils of the sea, or from machinery, boilers, or steam, or from

is in accord with the doctrine laid down in certain English cases that the liability of the carrier arises solely out of the contract of transportation rather than out of the general duty imposed by the law upon the carrier, as to all passengers.¹ And there is a line of American cases, including the later decisions upon the subject in New York, which adopt the English rule.² In some States, it appears to be considered

any act, neglect, or default whatsoever of the pilot, master, or mariner.' It was held that the acceptance of the ticket with this condition relieved the defendant from liability for injury or loss of life to a passenger, occasioned by the negligence of the defendant's servants. *Haigh v. Royal Mail Steam Packet Co.*, 52 L. J. (Q. B.) 640. The court apparently considered the case as falling within the rule which permits carriers of goods to limit their liability by contract. See *Simons v. Great Western Railway*, 18 C. B. 805; *London & Northwestern Railway v. Dunham*, 18 C. B. 826; *White v. Great Western Railway*, 2 C. B. (n. s.) 7; *Pardington v. South Wales R. R.*, 1 H. & N. 392; *M'Manus v. Lancashire & Yorkshire Railway*, 4 H. & N. 327; *Garton v. Bristol & Exeter Railway*, 1 B. & S. 112; *Peek v. North Staffordshire Railway*, 10 H. L. Cas. 473; *Allday v. Great Western Railway*, 5 B. & S. 903; *Doolan v. Midland Railway*, 2 App. Cas. 792; *Manchester R. R. v. Brown*, 8 App. Cas. 703; *Great Western Railway v. McCarthy*, 12 App. Cas. 218; *McCauley v. Furness R. R.*, 42 L. J. (Q. B.) 4; *Hall v. Northeastern R. R.*, 44 L. J. (Q. B.) 164; *Duff v. Great Northern R. R.*, 4 I. C. L. 178; *Alexander v. Toronto & N. R. R.*, 33 U. C. Q. B. 474. But it has been said: "The right which a passenger has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the 'carrier' to carry him safely." Per Blackburn, J., in *Austin v. Great Western R. R.*, L. R. 2 Q. B. 442. The English rule being as stated above, it will be applied on suit brought in the United States upon a transportation contract, made in Ireland, and so governed by the English law. *O'Reagan v. Cunard Steamship Co.*, 160 Mass. 356.

¹ See *Alton v. Midland Railway*, 19 C. B. (n. s.) 213. For a full discussion of this question see §§ 3, 5, 11, *ante*, notes and cases cited, and also see § 115, and note, *ante*.

² *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 485; *Wells v. New York Central R. R.*, 24 N. Y. 181; *Perkins v. New York Central R. R.*, 24 N. Y. 181; *Bissel v. New York Central R. R.* 25 N. Y. 442; *Poucher v. New York Central R. R.*, 49 N. Y. 263; *Magnin v. Dinsmore*, 56 N. Y. 168; *Mynard v. Syracuse, B. & N. Y. R. R.*, 71 N. Y. 180; *Canfield v. Baltimore & Ohio R. R.*, 93 N. Y. 532; *Kinney v. New Jersey Central R. R.*, 32 N. J. L. 407, 34 N. J. L. 513; *Western & Atlantic R. R. v. Bishop*, 50 Ga. 465. Where a railroad agreed to haul the cars of A. according to a special schedule of time, and at less than usual rates, A.

that although the carrier may limit his liability by contract, yet he cannot avail himself of the benefit of his contract in cases in which the injury complained of was the result of "gross" negligence on his own part.¹ It is apprehended that the distinction taken in these cases is not sound, since the best modern authority does not admit the existence of degrees of negligence.²

§ 117. **As to Persons transported gratuitously.**—If a common carrier accepts a person as passenger, there being no contract to relieve the carrier from the legal consequences of his negligence in the case of accident, it is held generally, in the United States, that the carrier remains liable for such negligence, although the plaintiff was to be transported gratuitously.³ For, having admitted the plaintiff to the rights of a passenger, the defendant is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to all his passengers. But the question whether a person transported gratuitously may, by a contract with the carrier, waive his right to recover in an action brought for injuries caused by the negligence of the carrier, has been the subject of contrary opinion. In behalf of the negative view of this question it is considered that, while the

agreeing at his own expense to load and unload the cars and to hold the railroad harmless from all claims for damages to persons or property, however accruing and to "assume all risk of accident from any cause;" and by reason of a defect in one of the cars, an employee of A. was injured; it was held that he could not recover for his injury as against the railroad, since the railroad had no control over the condition of the cars, and was not under obligation to haul them as a common carrier. *Robertson v. Old Colony R. R.*, 156 Mass. 525. See *Coup v. Wabash, St. L. & Pacific R. R.*, 56 Mich. 111.

¹ See *Illinois Central R. R. v. Read*, 37 Ill. 484; *Indiana Central R. R. v. Munday*, 21 Ind. 48; *Jacobus v. St. Paul & Chicago R. R.*, 20 Minn. 125.

² See § 92, *ante*, notes and cases cited.

³ *Todd v. Old Colony & Fall River R. R.*, 8 Allen, 18; *Commonwealth v. Vermont & Mass. R. R.*, 108 Mass. 7; *Files v. Boston & Albany R. R.*, 149 Mass. 204; *Philadelphia & Reading R. R. v. Derby*, 14 How. 468; *Steamboat New World v. King*, 16 How. 469. It is held generally that a person gratuitously conveyed may be a passenger. See § 114, *ante*, and cases cited.

relation of carrier and passenger is created by contract, the duty of the carrier is essentially a public duty attached by law to the employment,¹ and not to be waived or dispensed with by individual contracts; that this duty requires that the carrier should transport his passengers safely; and that reasons of public policy require that he shall be held to this duty as to all persons transported in common by him, altogether irrespective of the question whether or not he transports them gratuitously.² The contrary view, that the defendant may limit his liability by contract with the person carried gratuitously, would appear to rest principally upon the ground that in conveying the plaintiff gratuitously the carrier, *pro hac vice* and as to the plaintiff, puts off his public employment and does something which the law does not exact of him. The courts holding this view, however, appear to admit that the relation of passenger and carrier exists between the parties and that the carrier is bound by a public duty to transport his passengers safely.³ Although the ticket upon which the passenger is travelling is, in form, a "free pass," containing a condition limiting the carrier's liability, this condition will be invalid if the transportation is not, in fact, a matter of charity or gratuity. Thus a railway corporation was held liable for injuries caused by its negligence to a plaintiff who was travelling upon a free ticket, containing a stipulation against liability, for the common benefit of himself and the defendant carrier.⁴ The same rule is applied as to persons travelling upon "drovers' passes" which permit persons in

¹ See §§ 3, 5, 115, 116, *ante*.

² *Gulf, Colorado & Santa Fe R. R. v. McGown*, 65 Tex. 640; *Pennsylvania R. R. v. Henderson*, 51 Penn. St. 315; *Flinn v. Philadelphia, W. & B. R. R.*, 1 *Houst. (Del.)* 469; *Cleveland & P. & A. R. R. v. Curran*, 19 *Ohio St.* 1; *Mobile & Ohio R. R. v. Hopkins*, 41 *Ala.* 486.

³ See *Quimby v. Boston & Maine R. R.*, 150 *Mass.* 365; *Griswold v. New York & New England R. R.*, 53 *Conn.* 371; and cases cited, § 116, *ante*. It has been held that one who accepts and uses a free pass, as a gratuity on condition that he will assume all risk of personal injury, must be deemed to have accepted it on that condition whether he reads it or not; and such an exemption of the carrier from liability is effectual, and is not contrary to public policy. *Rogers v. Kennebec Steamboat Co.*, 86 *Maine*, 261.

⁴ *Grand Trunk Railway v. Stevens*, 95 *U. S.* 655.

charge of cattle in course of shipment by rail to pass over the lines of the defendant's road for the purpose of caring for such cattle.¹ An employee of a railroad was furnished by it each month with a ticket entitling him to more rides than were necessary for his travel to and from his work, and on which he was at liberty to ride on his own private business. A contract on the ticket provided that "The person accepting this free ticket thereby and in consideration thereof assumes all risk of accidents, and expressly agrees that the company is not a common carrier in respect to him, and shall not be liable under any circumstances, whether negligence of its agents or otherwise, for injury to the person . . . of the passenger using this ticket." While travelling on his own business, during his own time, he was killed by the gross negligence of the company's servant. In the statutory action by his administrator, for damages, it was held that the intestate was not, at the time he was killed, an employee of the defendant; that he was a passenger, and that the contract on the ticket, although the statute was a penal one, did not release the defendant from liability. It was considered, in this case, that the agreement of the defendant to transport the plaintiff's intestate to and from his home furnished part of the consideration which induced him to enter the employment of the defendant.² A civil engineer of a railway company, travelling on its business on a free pass and in a sleeping car, is not a passenger but an employee.³

¹ New York Central R. R. v. Lockwood, 17 Wall. 357, 376; Delaware L. & W. R. R. v. Ashley, 28 U. S. App. 375.

² Doyle v. Fitchburg R. R., 162 Mass. 66; 166 Mass. 492. In an action against a railroad by an employee injured by defendant's negligence it appeared that defendant gave the plaintiff a pass from Trenton, N. J., to Philadelphia and another from Philadelphia to Elmira, N. Y., by the terms of which latter he assumed all risks of accident. The injury occurred at Harrisburg, Penn. By the law of New Jersey a contract by which the carrier is relieved from liability in consideration of free transportation is valid, but the contrary rule is held in Pennsylvania. It was held that the contract was governed by the law of Pennsylvania and that the plaintiff was entitled to recover; since when a contract is made in one State to be performed in another, its validity and effect are to be determined by the laws of the State where it is to be performed. Burnett v. Penn. R. R., 176 Penn. St. 45.

³ Texas & Pacific R. R. v. Smith, 30 U. S. App. 176.

(b) *Rule of Liability applied to Railroads.*

§ 118. **Measure of Liability, generally.** — Applying the general rules already stated ¹ to cases in which railroads are passenger-carriers for hire, it may be said that such carriers are bound to exercise the utmost care in providing proper and suitable cars, engines, tracks, and structures, and agents, in order to prevent such accidents as human foresight can guard against; that is, such accidents as are not inevitable. This duty exists in respect of the ordinary and usual appliances and means used in carrying on the business. The carrier is not bound to use every possible precaution which human ingenuity may suggest to prevent accident, since that might be inconsistent with the cheapness and speed which are among the principal advantages attending railroad transportation, but the care required is to be exercised in relation to such matters, and in such directions, as are appropriate to the business which the carrier has undertaken, so as to afford reasonable security to the passenger against injury; and in these matters the importance of the interests involved requires that the carrier be held to a proportionate, that is, to the utmost, care and diligence.² It is the duty of a steam or electric railroad corporation to use ordinary care to avail itself of new inventions and improvements which will contribute to the safety of passengers; but it is not bound to have in use the latest improvements which ingenuity has devised for that purpose.³ A railroad is bound to the same degree of care whether it transports its passengers on a passenger or on a freight train.⁴ As to private railways, operated in the special business of their owners, the special rules of obligation which are applied to common carriers obviously do not apply.⁵ The obligation of the railroad to furnish suitable means and appliances, and

¹ See § 113, *ante*.

² *Warren v. Fitchburg R. R.*, 8 Allen, 227.

³ *Richmond, &c. Railway v. Garthright*, 92 Va. 627; *Witsell v. W. Ashville, &c. Railway*, 122 N. C. 902.

⁴ *Dillingham v. Wood*, 8 Tex. Civ. App. 71.

⁵ *Wade v. Lutchter, &c. Co.*, 41 U. S. App. 45.

to employ competent servants, subsists as well towards its employees as towards its passengers.¹

§ 119. *Illustrations of the Principle stated.*—A railroad is bound so to construct and equip its road that it may reasonably be expected to withstand any strain to which railroads are customarily exposed; in other words, in the selection of plans and materials for its road-beds, bridges, and appliances, it is bound to use such care as will seem sufficient to ordinarily prudent men understanding the circumstances and necessities of the case. While the mere fact that an accident is so extraordinary that it could not reasonably have been anticipated² will not relieve the carrier from responsibility for its negligence, it is not, as matter of law, bound to anticipate and provide for extraordinary accidents. Thus it was held that the defendant railroad was not bound so to construct a bridge that it should resist the extraordinary shock of a train which had left the track while running at ordinary speed.³ But it

¹ *Greenleaf v. Illinois Central R. R.*, 29 Iowa, 14. See §§ 192 *et seq.*, *post*. In *Louisville & Nashville R. R. v. Ritter*, 85 Ky. 363, it was said that the railroad is liable in damages for the slightest negligence against which human prudence, diligence, or skill can guard, and by which a passenger is injured; but the rule stated in this case is not in accordance with the tenor of the modern authorities. See § 113, *ante*, notes and cases cited; *Burns v. Chicago, Milwaukee & St. Paul Railway*, 69 Iowa, 450. Where a passenger while stepping from the car of an elevated railroad to the station platform was injured by the sudden starting of the car, and it appeared that, in order to steady himself when the train stopped, he had caught hold of the bell-cord and thereby given the signal to start the train, it was held that the question whether there was any vice in the system of communicating signals and whether the method of fixing the bell-rope was the best method, and so, whether the defendant was negligent, was for the jury. *Ferry v. Manhattan Railway*, 118 N. Y. 497. It is said that a railroad company has a right to refuse to move its passenger trains if they become overcrowded, and it is unable to prevent such overcrowding; but if it undertakes to move cars so overcrowded, it is bound to use additional care commensurate with the danger. *Lynn v. South. Pac. Co.*, 103 Cal. 7.

² *Doyle v. Chicago, St. P. & K. R. R.*, 77 Iowa, 607, and see *Maher v. Manhattan Railway*, 53 Hun, 506; *Chicago, Milwaukee & St. P. R. R. v. Harper*, 128 Ill. 384; *Libby v. Maine Central R. R.*, 85 Maine, 34.

³ *Pershing v. Chicago, Burlington & Quincy R. R.*, 71 Iowa, 561. In this case, it was said that the railroad was bound to the degree of care

was held that a railroad corporation was responsible for the insufficiency of its culverts to carry off the water in case of an overflow, which, although extraordinary, might have been anticipated; as where it appeared that similar overflows had occurred at the same place in 1833, 1843, and 1852, and that the injuries for which the suit was brought happened in 1885.¹ It is held that the mere fact of the existence of a spread or bent rail in the track of a railroad is not, as matter of law, conclusive of negligence.² So it was considered to be a question of fact whether a railroad corporation was negligent in not putting up a "bunter," or other obstruction, at the end of a spur track, by reason of the absence of which an accident had occurred.³ In the selection of its trainmen, a railroad is bound to exercise a care proportional to the responsibility which the nature of their employment will impose upon them, the road being charged with a like responsibility, in this respect, as to its passengers and servants.⁴ But it was held error to charge that, in handling its locomotives, the

which is used by the most carefully managed roads under like circumstances; but it would seem that this rule does not establish a criterion of responsibility which can safely be applied to all cases, since, on the one hand a road most carefully managed, generally, may be negligent in some one particular, and on the other hand may take precautions in some special direction for the prevention of accidents which reasonable men may deem to be unnecessary. It seems that the only safe rule to apply in this as in other cases of alleged negligence is to inquire whether the precautions taken by the defendant to avoid accident were, within the judgment of reasonable men, sufficient; although, in determining the question as to what precautions were necessary, the practice of other railroads to prevent the occurrence of similar accidents may be admissible.

¹ *Gulf, Colorado & Santa Fe R. R. v. Pomeroy*, 67 Tex. 498. In *Withers v. North Kent Railway*, 27 L. J. (N. S.) Exch. 417, Pollock, C. B., said that the defendant was not bound to have his line constructed so as to meet extraordinary floods, but see *Ruck v. Williams*, 27 L. J. (N. S.) Exch. 357; *Great Western Railway v. Braid*, 1 Moore, P. C. (N. S.) 101.

² *Arkansas M. R. R. v. Canman*, 52 Ark. 517.

³ *Shaw v. New York & N. E. R. R.*, 150 Mass. 182.

⁴ *Gorman v. Minneapolis & St. Louis R. R.*, 78 Iowa, 509. In this case it was held that it was not negligence for a railroad company to employ an inexperienced youth twenty-two years old, as a brakeman; it not appearing that he was physically or mentally incompetent for the employment.

road was bound to use such skill and care as the "most prudent" are accustomed to use in like circumstances.¹ It was held that a statute providing that railroad companies should fence their tracks and be liable for injuries to live stock occasioned by their failure so to do, was for the protection of persons on the trains as well as of animals on the tracks.² It may be said generally, that, as to notice of defects existing in its road-bed or buildings, like rules apply between the corporation and its officers, as between municipal corporations and their officers, in regard to the existence of defects in highways;³ that is, knowledge of the existence of the defect on the part of the officer or agent whose business it is to guard against or to look out for it, is the knowledge of the corporation.⁴ A street railway company is bound to use reasonable care in the selection of horses for its cars.⁵ Whether the overcrowding of railway cars is negligence, is held to be a question of fact in the particular case.⁶ The only obligation to which a railway company can be held in respect to the communication by its telegraph of a sudden and temporary change in the running time of trains is that of reasonable care in transmitting the necessary orders.⁷

§ 119 a. **Duty of Railroad to the Public, generally.** — So far as its relations to the general public are concerned, the duty of a railroad is that of ordinary and reasonable care, and it will not be responsible for injuries which result from incidents which are inseparable from the ordinary operation of its trains; as for the consequences of noise, vibration or smoke;⁸ or for the escape of steam from its locomotives,⁹ or for the noise of

¹ *Gulf, C. & S. F. R. R. v. Hodges*, 76 Tex. 60; *Houston & T. C. R. R. v. Brin*, 77 Tex. 174.

² *Donegan v. Erhardt*, 119 N. Y. 468.

³ See §§ 183-185, *post*.

⁴ *Krogg v. Atlanta & W. P. R. R.*, 77 Ga. 202.

⁵ *Noble v. St. Joseph, &c. Railway*, 98 Mich. 249.

⁶ *Graham v. Manhattan Co.*, 149 N. Y. 336.

⁷ *Baltimore & Ohio R. R. v. Camp*, 31 U. S. App. 213.

⁸ *Favor v. Boston & Lowell R. R.*, 114 Mass. 350; *Lamb v. Old Colony R. R.*, 140 Mass. 79.

⁹ *Howard v. Union Freight R. R.*, 156 Mass. 159; *Phil., W. & B. R. R. v. Burkhardt*, 83 Md. 516; *Cahoon v. Chic. & N. Y. R. R.*, 85 Wis. 570.

its whistles, although these are being used for the purpose of signalling for its own convenience, and not for the purpose of warning the public of danger, as required by law, such use being, under the circumstances, careful and prudent; but it is not for the railroad to establish a signal, however reasonable and proper, in itself, and to say that it may be given under any and all circumstances, regardless of consequences.¹ The noise made by the starting of an electric car, if usual and necessary, is an incident to the operation of the car, and the person or corporation running the car is not responsible for the injurious results to travellers.² It is held to be the duty of a railroad company to use reasonable diligence in the conduct and management of its trains so that persons on the public highway shall not be injured by negligent acts performed by any one on its trains; either a passenger, or an employee of the road, acting outside of the scope of his employment, if such acts are customary or reasonably to be anticipated by the company. Thus where the company permitted its workmen, going home on its trains, to carry with them sticks of refuse lumber for firewood and to throw these from the train at a convenient place; and the plaintiff, an employee of the railroad, was injured by a stick so thrown, the company was held liable.³ It is not, generally, negligence on the part of a railroad to omit to fence its tracks at a point where there is no public crossing.⁴ It is negligence to run detached cars

¹ *Flynn v. Boston & Albany R. R.*, 169 Mass. 305; *Barron v. Chic., St. P. & C. R. R.*, 89 Wis. 79. See *Hill v. Maine Cent. R. R.*, 55 Maine, 438; *Boothbay v. Boston & Maine R. R.*, 90 Maine, 313; *Louisville & N. R. R. v. Schmidt*, 147 Ind. 638; *Southern R. R. v. Torian*, 95 Va. 453; *Wabash R. R. v. Speer*, 156 Ill. 244; *Heininger v. Great Northern R. R.*, 59 Minn. 458; *Mitchell v. Railroad*, 100 Tenn. 329. As to the duties of railroads at highway crossings, see § 120, *post*.

² *McDonald v. Toledo, & C. Railway*, 43 U. S. App. 79.

³ *Fletcher v. Balt. & Ohio R. R.*, 168 U. S. 135. The court distinguishes the case of *Walton v. N. Y. Central Sleeping Car Co.*, 139 Mass. 556, where the injury was caused by a bundle thrown from the defendant's car by its servant; but it did not appear that such acts were customary, or that any officer of the company on the train knew of the act.

⁴ *Tillotson v. Tex. & Pac. R. R.*, 44 La. Ann. 95. The mere piling of dirt or clay on or near a street railway track, for use in ballasting the track where it had been undermined by a washout, is not negligence.

along the streets of a city.¹ In some States, the rights of way, respectively, of street cars, and pedestrians, and drivers of ordinary vehicles, are attempted to be regulated by statute. In the absence of statutory regulation, it has been held that the rights of street railways in streets are in some respects superior to those of pedestrians; but that the railway is bound to use reasonable care to avoid injuring pedestrians.² Elsewhere, it is held that street cars have not rights paramount to those of ordinary vehicles.³

§ 120. *Duty of Railroad as to Crossings.*—Subject to the rule that the railroad is bound to run its trains over public crossings at a rate of speed to be proportionate to the circumstances of danger, the company has an unrestricted right to the use of its road-bed, and is not responsible to strangers for the accidental results of such proper user.⁴ Thus the railroad is not liable for injuries which result from the frightening of horses by the noise of its trains, these being operated in a lawful manner and without negligence or malice.⁵ It is obvious that a railroad has the right, essential to the carrying on of its business, to back its locomotives, shift and couple cars, &c., although this may be dangerous, and require special care on the part of the servants of the railroad.⁵ The railroad has a right to maintain necessary and proper buildings and structures about its crossings, and it is held that the

Noble v. St. Joseph, &c. Railway, 98 Mich. 249. But where a railroad placed a large pile of ashes and cinders on a street, whereby a child fell under a moving train, it was held to be negligent. *Chicago & Alton R. R. v. Nelson*, 153 Ill. 89.

¹ *Galveston, H. & San Antonio R. R. v. Lewis*, 5 Tex. Civ. App. 638.

² See *Winter v. Federal St. Railway*, 153 Penn. St. 26; *Gilmore v. Federal St. Railway*, 153 Penn. St. 31; *Gibbons v. Wilkes-Barre Railway*, 155 Penn. St. 279; *Lott v. Frankford, &c. R. R.*, 159 Penn. St. 471.

³ *Lake Roland Co. v. McKewen*, 80 Md. 593.

⁴ § 119 a, *ante*; *Ryan v. Pennsylvania R. R.*, 132 Penn. St. 304; *Gulf, C. & S. F. R. R. v. Hodges*, 76 Tex. 90. It was held that the failure of an engineer to bring his train to a full stop at a street crossing, on discovering that an approaching team was frightened, was negligence. *Houston & T. C. R. R. v. Carson*, 66 Tex. 345.

⁵ *Batishill v. Humphreys*, 64 Mich. 494; *Sullivan v. Penn. R. R.*, 7 Atl. Rep. 177 (Penn. 1887).

mere existence of trees, fences, and other objects upon the right of way of a railway corporation, does not constitute negligence, although the existence of such objects may have a bearing to determine the degree of care to be exercised by the railway and by persons using the crossing.¹ It is obvious that a railway crossing may be established by prescription, and where the corporation has, for a long time, permitted the public to pass habitually over its track at a certain point, without objection, it is bound to exercise care in the management of its trains at such a crossing, proportionate to the probable danger to persons using it.² And it seems that if the corporation has reasonable grounds to be aware of the user of its track at a particular point, even by trespassers, it is bound to exercise a proportionate care at that point;³ and

¹ *Pence v. Chicago, Rock Island & Pac. R. R.*, 79 Iowa, 389. But see apparently *contra*, *Chicago & E. I. R. R. v. Tilton*, 29 Ill. App. 95. In *Reed v. Chicago, St. Paul, M. & O. R. R.*, 74 Iowa, 185, it was held negligence for a railway corporation to obstruct a street crossing unnecessarily so as to deprive travellers approaching it of a full view of the street. It is not negligence to leave a box-car in sight of but not encroaching upon the road, nor, unless the car be left for an unreasonable time, is the road responsible if a stranger moves the car upon the road, whereby injury results. *Cleveland, C. C. & I. R. R. v. Wynant*, 114 Ind. 525. It is negligent to cut a car loose and permit it to run across a public street unguarded so as to endanger the safety of travellers passing along the street, *O'Connor v. Missouri Pacific R. R.*, 94 Mo. 150; or to back a car over a crossing without stationing a lookout to give warning to travellers. *Duame v. Chicago & Northwestern R. R.*, 72 Wis. 523; *Cleveland, C. C. & St. L. R. R., v. Keely*, 138 Ind. 600. See § 123, *post*.

² *Harriman v. Pittsburg, C. & St. L. R. R.*, 45 Ohio St. 11; *Taylor v. Delaware & H. Canal Co.*, 113 Penn. St. 162; *Byrne v. New York Cent. & H. R. R. R.*, 104 N. Y. 362; *Guggenheim v. Lake Shore & M. S. R. R.*, 66 Mich. 150; *Philadelphia, W. & B. R. R. v. Hogeland*, 66 Md. 149. The fact that there is a private way across a railroad by reservation does not prevent the public from gaining a right to use the way by prescription. *Sprow v. Boston & Albany R. R.*, 163 Mass. 330.

³ *Cassida v. Oregon Railway & Nav. Co.*, 14 Oregon, 551; *Whalen v. Chicago & N. W. R. R.*, 75 Wis. 654; *Bergneau v. St. Louis, I. M. & So. R. R.*, 88 Mo. 678. But it has been held that a statute requiring signals at crossings cannot be invoked by trespasser on the track near the crossing. *Blankenship v. Galveston, H. & San A. R. R.*, 15 Tex. Civ. App. 82. Where the track of a railway corporation was crossed, at grade,

so as to persons negligently using a crossing.¹ In the absence of a municipal ordinance imposing special duties on a railroad company within corporate limits, the obligation of the company, in respect of care at crossings, is not changed when its train crosses the corporate line, as the company is bound in any case to a measure of care commensurate to the character of the crossing and the amount of travel over it.² So, making a flying switch over a frequented street, in the night-time, is negligence;³ and so is running a train at a rate of forty miles an hour over a crossing in a town, where

by a track belonging to a private person, through the negligence of whose servants a collision occurred at the crossing, it was held that the fact that the defendant permitted the existence of the crossing did not raise against it any presumption of negligence. *Bunting v. Pennsylvania R. R.*, 118 Penn. St. 204. Where two railroads cross at grade, it is negligence for one of them to leave an uncoupled car standing so as to project over the crossing. *Albert v. Sweet*, 116 N. Y. 363. So it is negligent unnecessarily to stop a car upon the crossing of another railroad, although it is done for the defendant's convenience. *Lanning v. Chicago, B. & Q. R. R.*, 68 Iowa, 502. Under Rev. Sts. Indiana, §§ 3904, 3905, imposing upon railway companies the duty of keeping their tracks in repair at crossings, it was held that it was negligence *per se*, to neglect this duty, and that a company neglecting it was liable for injuries resulting from such neglect, although, in fact, it was ignorant of the particular defect which caused the injury complained of. *Indiana, B. & W. R. R. v. Barnhart*, 114 Ind. 382. See, also, *Western & Atlantic R. R. v. Young*, 81 Ga. 397. But see § 112, *ante*, notes and cases cited.

¹ *Union Pacific R. R. v. Mertes*, 35 Neb. 204.

² *Atchison, Topeka & Santa Fe R. R. v. McClurg*, 19 U. S. App. 346. A contrary rule seems to be held in *Newhard v. Penn. R. R.*, 153 Penn. St. 417, in which case it was held that the right of a traveller to use a highway crossing is subordinate to the right of the railroad, and, in the absence of statutory regulations requiring it, a railway train which has given proper signals and warnings of its approach, is not required to slow up at the crossing. It has been held that street railway cars have a right of way at crossings. *Thompson v. Buffalo R. R.*, 143 N. Y. 196. But an ordinance giving a right of way generally to street cars, gives the driver of a car no right to ignore the presence of other vehicles on the street, especially at crossings. *Thoresen v. La Crosse City Railway*, 87 Wis. 597.

³ *Alabama Great So. R. R. v. Anderson*, 109 Ala. 299; *Watson v. Minn. Street Railway*, 53 Minn. 551.

the view is obstructed.¹ The servants of the railroad have a right to assume that a person approaching a crossing will exercise ordinary care for his own safety.²

§ 121. **Degree of Care at Stations and the Approaches thereto.** — The general rule that the carrier is bound to the exercise of such care and diligence as is reasonably possible to protect the passenger from injuries which human foresight can anticipate and prevent, applies so long as the relation of passenger and carrier subsists; and it is the duty of the railroad to keep its stations, platforms, yards, and the approaches thereto, over which passengers must pass, in order to reach their trains, in a reasonably safe condition.³ But it is evident that the degree of foresight, and so the degree of care, required must depend in every case upon the gravity of the consequences which may be expected to follow the lack of care, and a railroad corporation may not be bound to exercise the same degree of care towards a passenger passing through its station grounds to the highway, or from the highway through the grounds and station to the cars, that would be required from it as to a passenger actually being conveyed in its cars; since far graver consequences might be expected to follow a lack of extreme care in the latter than in the former case. And it is said that a railroad corporation would not act reasonably if it did not exercise greater care in equipping and running its trains than in its oversight over its station and grounds.⁴ It is apprehended that, as regards its stations and the approaches thereto, the railroad is affected with the same obligations towards its passengers as the owner or occupant of land or buildings, generally, as to those who come upon the premises by his express or implied invitation.⁵ Where a railroad company so locates its station as to require persons approaching it to cross several tracks which are kept smooth for pedestrians and without any well defined crossings; this is tanta-

¹ *Pratt v. Chic., R. I. & Pac. R. R.*, 98 Iowa, 563, and see *St. Louis Con. R. R. v. O'Hara*, 151 Ill. 580.

² *Graf v. Chic. & Northwestern R. R.*, 94 Mich. 579.

³ *Fullerton v. Fordyce*, 144 Mo. 519.

⁴ *Moreland v. Boston & Providence R. R.*, 141 Mass. 31.

⁵ See §§ 64 *et seq.*, *ante*.

mount to an invitation to cross at any point near the station, and persons so crossing to take passage on a train are not trespassers.¹ In the absence of knowledge that only one safe path has been provided by a railroad for leaving a passenger station, and of any notice or direction to take a particular path, a passenger may take any path which appears to be designed and used as a way to the street, and, as to him, the railroad is bound to see that such path is reasonably safe.² It is the duty of a railway company to keep its stations, platforms, and the approaches thereto, reasonably safe and well-lighted, with a careful regard for the safety of passengers.³ It is negligence for a railroad to allow an accumulation of ice from its station roof to remain on the platform.⁴ Generally, it is negligence on the part of a railway company to run a train rapidly through or past a station where another train is discharging and receiving passengers, or without warning.⁵ It is the duty of a railroad to afford passengers sufficient opportunity safely to alight at its stations, and to enter and leave its cars.⁶ So it is the duty of a street railway company to

¹ Louisville, N. O. & T. R. R. v. Hirsch, 69 Miss. 126.

² Cazneau v. Fitchburg R. R., 161 Mass. 355. A railroad is not bound to place fences or screens along its tracks in its station grounds to prevent the frightening of horses approaching the station. Flagg v. Chicago, &c. Railway, 96 Mich. 30.

³ Lucas v. Penn. Co., 120 Ind. 583; Louisville, N. A. &c. R. R. v. Treadway, 143 Ind. 689; Penn. Co. v. Marion, 123 Ind. 415; Praeger v. Bristol & E. R. R., 24 L. T. (N. S.) 105; Union Pacific R. R. v. Sue, 25 Neb. 772; Hiatt v. Des Moines, N. & W. R. R., 96 Iowa, 167.

⁴ Waterbury v. Chic., M. & St. P. R. R. 104 Iowa, 32.

⁵ Baltimore & Ohio R. R. v. State, 81 Md. 371. See Purnell v. Raleigh & G. R. R., 122 N. C. 832; Sanchez v. San Antonio & Ar. Pass. R. R., 3 Tex. Civ. App. 89. It was held that to detach the rear part and allow it to follow the forward portion of a train, at a short interval, past a station in the dark, without warning or signal, was such negligence as would make the company liable for an injury thereby caused to one who was attempting to cross the track at the station, although he was, technically, a trespasser. Conley v. Cincinnati, N. O. & T. P. R. R., 89 Ky. 402.

⁶ Chicago & Alton R. R. v. Arnol, 144 Ill. 261; Madden v. Mo. Pacific R. R., 50 Mo. App. 666; Hays v. Wabash R. R., 51 Mo. App. 438; Barth v. Kansas City El. R. R., 142 Mo. App. 535; Lamb v. Los Angeles Terminal Railway, 103 Cal. 473. The failure to delay a train to enable a

stop its cars at suitable places for passengers to leave them, and to make stops long enough to enable passengers to alight safely.¹

§ 122. **Rate of Speed of Trains.** — In the absence of special circumstances which make the act negligent, a railway compelled passenger to get on board, the train having made a proper stop at the station, is not negligence for which the railroad will be liable to such a passenger if he is injured in attempting to board the train after it has started, it not appearing that the defendant's servants induced or invited the plaintiff to make the attempt. *Paulitsch v. New York Central & H. R. R.* 102 N. Y. 280. It is held to be a circumstance bearing on the question of the carrier's negligence that as a train is about to stop within the limits of a station, but not to deliver passengers, a public announcement of the station is made, with a direction to "change" for another station, and no counter warning is given to the passengers not to leave the train. *Floythrup v. Boston & Maine R. R.*, 163 Mass. 152. In Pennsylvania, it is provided that when any person is injured while lawfully on or about the premises, cars, etc., of a railroad company of which he is not an employee, the company's liability shall be only such as would exist if the person injured were its employee. Act April 4, 1868 (P. L. 58). See *Stone v. Pennsylvania R. R.*, 132 Penn. St. 206; *Price v. Pennsylvania R. R.*, 113 U. S. 218. It has been held that a railroad is not bound to guard against an exodus of passengers at a railway crossing, at which it does not discharge passengers, merely because its conductor has announced the name of the next station after making the last preceding stop. *Minock v. Detroit, G. H. & M. R. R.*, 97 Mich. 425. Where a passenger lawfully on the station platform of the defendant railroad was struck and injured by a mailbag, thrown from a postal car attached to a passing train, by an employee of the United States, this being the customary method of discharging mails at the station, and the defendant having noticed this and not having taken precautions to prevent injury, it was held that the fact that the postal clerk was not in defendant's employ did not relieve it from liability, and that negligence on its part might be inferred. *Carpenter v. Boston & Albany R. R.*, 97 N. Y. 494. See also *Toledo, W. & W. R. R. v. Maine*, 67 Ill. 298, and, apparently *contra*, *Pennsylvania R. R. v. Russ*, 57 N. J. L. 126. In Massachusetts, under St. 1894, c. 469, § 3, it was held that if a passenger, lawfully upon the platform of a railway station, is struck and injured by a package thrown by an expressman from an express car attached to a train, in which the passenger is about taking passage, he cannot maintain an action against the railway company for his injury. *Winship v. N. Y., N. H. & H. R. R.*, 170 Mass. 464.

¹ *Jagger v. Peoples Street Railway*, 180 Penn. St. 436. See *North Chicago Street R. R. v. Cook*, 145 Ill. 551; *Baldwin v. Fairhaven R. R.*, 68 Conn. 567.

pany has the right to run its trains at such a rate of speed as it deems proper, and it is held that, except when approaching the crossings of public streets or highways, the engineer is not bound to look out for persons on the track,¹ since the corporation is not bound to anticipate the presence of trespassers upon its track. It is obvious that the rule will be different when the company has reason to know that persons are on its track at some particular point, for a lawful purpose.² It is ordinarily for the jury to determine, under the circumstances of the case, whether the road is negligent in running a train at a particular rate of speed.³ But, whether prohibited by statute or not, it would seem to be, as matter of law, negligent to run a train at a high rate of speed over a public crossing without warning,⁴ or through a frequented street in a city or village.⁵ So the running of a train, at a high rate of speed, at an unusual hour, and without warning, past an-

¹ *Farve v. Louisville & Nashville R. R.*, 42 Fed. Rep. 441; *Grand Rapids & Indiana R. R. v. Huntley*, 38 Mich. 537; *New York, P. & N. R. R. v. Kellam*, 83 Va. 851. Where a train made a "flying switch" and the car switched struck and injured the plaintiff, who had stepped from the main track upon the switch track in order to avoid the main line train, it was held that the defendant was negligent, although the defendant's servants saw the plaintiff, and tried to attract his attention to the switched car, which struck the plaintiff before the brake upon it could be set. *Louisville & N. R. R. v. Coleman*, 86 Ky. 556. See *Louisville & Nashville R. R. v. Coniff*, 90 Ky. 560. But it was held that as to an employee, plaintiff, the fact of the defendant's making a "flying switch" was evidence of negligence, merely, for the jury to consider. *Chicago & Alton R. R. v. Kelly*, 28 Ill. App. 655.

² *Chicago & Northwestern R. R. v. Dunleavy*, 27 Ill. App. 438, 129 Ill. 132.

³ *Thompson v. New York Cent. & H. R. R. R.*, 110 N. Y. 636; *Bittner v. Crosstown Railway*, 153 N. Y. 76; *Meloy v. Chicago & Northwestern R. R.*, 77 Iowa, 748; *Bollinger v. St. Paul & D. R. R.*, 36 Minn. 418; *Heath v. Stewart*, 90 Wis. 418; *Chic. P. & St. L. R. R. v. Lewis*, 145 Ill. 67; *Chic. & Alton R. R. v. Sanders*, 154 Ill. 531; *Chic. B. & Q. R. R. v. Anderson*, 38 Neb. 112; *Chesapeake & Ohio R. R. v. Cleaves*, 93 Va. 189; *Louisville & N. R. R. v. Woods*, 105 Ala.

⁴ *St. Louis, V. & T. H. R. R. v. Faitz*, 23 Ill. App. 498. And it has been so held as to a street railway car. *Evers v. Philadelphia El. Traction Co.*, 176 Penn. St. 376.

⁵ *Reilly v. Hannibal & St. Jo. R. R.*, 94 Mo. 600.

other train standing at a platform and discharging passengers, who, in order to reach their destination, must cross the track of the moving train, is, as matter of law, negligence.¹ The rate of speed at which trains may be run over crossings, or through populous places, as cities or villages, is generally made a subject of statute or municipal regulation, and it has been held that the running of a train at a rate prohibited by statute is, *per se*, negligence;² but it is apprehended that such a rule is not to be justified on principle, and that the fact of the violation of the statute in such cases is evidence of negligence, merely.³ On the other hand, the fact that a statute fixes a maximum rate of speed for railway trains within the limits of towns and cities does not justify the railroad in maintaining that rate of speed when the exercise of reasonable care requires that a train be run more slowly.⁴

§ 123. **Of the Obligation to give Warnings and Signals.** — It is perhaps difficult to reconcile with each other all the decided cases upon the question whether the defendant railroad has been negligent in failing to give proper signals or warnings of the approach of its trains; but it may be said, generally, that the ordinary rule is to be applied in such cases,⁵ and that when, under all the circumstances in any case, it is evident, beyond any fair doubt by intelligent men, and upon uncontroverted testimony, that the defendant railroad was negligent in failing to give a proper signal or warning, the court should so instruct the jury; but when the testimony leaves this matter in doubt, it is to be left to the jury as being a question of fact.⁶ It is

¹ *Robostelli v. New York, N. H. & H. R. R.*, 33 Fed. Rep. 796; *Tubbs v. Mich. Cent. R. R.*, 107 Mich. 108. See § 121. In many jurisdictions, the statute requires that trains shall come to a stop on approaching a station at which a standing train is discharging passengers.

² See *Keim v. Union Railway & Transit Co.*, 92 Mo. 314, and cases cited, § 112, *ante*.

³ *Clark v. Boston & Maine R. R.*, 64 N. H. 323; § 112, *ante*.

⁴ *Louisville, N. O. & T. R. R. v. French*, 69 Miss. 121; *Alabama & Vicksburg R. R. v. Phillips*, 70 Miss. 14.

⁵ See §§ 93, 111, *ante*.

⁶ Thus it has been held under certain circumstances that the failure to ring the bell or sound the whistle at a crossing was not, as matter of law,

obvious that the railroad is bound to a greater degree of care in the management of its trains in a frequented than it is in

negligent. *Walker v. Boston & Maine R. R.*, 64 N. H. 414; *International & G. N. R. R. v. McDonald*, 75 Tex. 41; *Houston & T. C. R. R. v. Brin*, 77 Tex. 174. Although such timely warning of the approach of a street car must be given as will enable travellers to avoid danger from it, *Cons. Traction Co. v. Haight*, 59 N. J. L. 577; yet this duty may be modified by circumstances. *Phil. Traction Co. v. Lightcap*, 17 U. S. App. 605. It has been held that a person walking on a railroad track, whether a trespasser or licensee, has a right to suppose that the usual and proper warnings and signals of the approach of a train will be given. *Stanley v. Durham & N. R. R.*, 120 N. C. 514; *McLamb v. Wilmington & W. R. R.*, 122 N. C. 862. It has been held that it was a question for the jury whether the presence of a watchman, or flagman, at a crossing was a necessary precaution for the safety of the public, *Bolinger v. St. Paul & D. R. R.*, 36 Minn. 418; *Chicago & I. R. R. v. Lane*, 30 Ill. App. 437, 130 Ill. 116, and see *Union Pacific R. R. v. Henry*, 36 Kan. 565; *Battishill v. Humphreys*, 64 Mich. 494; and on the other hand, that when it was manifestly negligent for the defendant railroad to omit to so station a flagman, it was error to leave the question of negligence to the jury. *Crawford v. Delaware, L. & W. R. R.*, 55 N. Y. S. C. 50. In *Johnson v. Baltimore & Potomac R. R.*, 6 Mackey, 232, *Missouri Pacific R. R. v. Pierce*, 33 Kan. 61, and *Clark v. Missouri Pacific R. R.*, 35 Kan. 350, it was held to be negligence, *per se*, to fail to give timely and reasonable notice of the approach of a railroad train to a station. In *Carrington v. Louisville & Nashville R. R.*, 88 Ala. 472, it was held that, in the absence of a statutory requirement, it was not negligence to fail to sound a whistle on the approach of a train to villages or collections of houses near its track. When the testimony is conflicting as to whether or not, in any case, the required signals were given, the question is for the jury. *Reed v. Chicago, St. Paul, M. & O. R. R.*, 74 Iowa, 188; *Wall v. Delaware, L. & W. R. R.*, 54 Hun, 454; *State v. Union R. R.*, 70 Md. 69; *Atchison, Topeka & S. F. R. R. v. Morgan*, 43 Kan. 1; *Murray v. Missouri Pacific R. R.*, 101 Mo. 136. But it is error to leave to the jury to determine what signals should be used, and to find that the failure to use such signals is negligent. *Hollender v. New York Cent. & H. R. R. R.*, 14 Daly, 219, 19 Abb. N. C. 18. The fact that signals were not heard is generally competent as tending to show that these were not given; although the weight of such testimony may well be less than that of positive testimony to the fact that such signals were given. *Menard v. Boston & Maine R. R.*, 150 Mass. 386; *Hubbard v. Boston & Albany R. R.*, 159 Mass. 320; *Perkins v. Buffalo, R. & P. R. R.*, 10 N. Y. S. Sup. N. E. Rep. 356 (1890); *Murray v. Missouri Pacific R. R.*, 101 Mo. 136; *Lee v. Chicago, R. I. & Pac. R. R.*, 80 Iowa, 172. And it has been held, further, that witnesses might be permitted to testify that they could have heard a whistle if it had been sounded. *Chicago & Alton R.*

an unfrequented locality, and so ought to signal the approach of its trains at street crossings within the limits of populous villages, or cities ;¹ although there be no statute or ordinance imposing this duty. And so it is held that although it may not be negligence for a train to be behind time, yet if it be behind time, it is the duty of the company to give such additional warnings as may be necessary for the safety of persons using a crossing.² So when the company has placed cars or other obstructions so as to cut off the view of trains approaching a crossing, it is its duty to give such additional warning.³ It is negligence to run a special train, at an unusual time and at an extraordinary rate of speed, across a public highway without signalling its approach ;⁴ or to back a train, without stationing a lookout at its rear end, across a thoroughfare, in a village, even at a moderate rate of speed, there being no flagman at the crossing,⁵ or to propel a car forward through a town, at its own impetus, without any one to control it or give warning of its approach.⁶ Persons who habitually use a crossing have a right to rely upon the customary signals being given, the use of these being known to them. Gates at crossings are for the purpose of warning people of the approach of trains and to serve as effectual barriers to keep the public from the track.⁷ And if a railroad company establishes gates at a crossing, and advertises the public of that fact, its failure to close such gates on the approach of a train is negligence.⁸ The railroad is bound to an equal duty

R. v. Dillon, 24 Ill. App. 203, 123 Ill. 570. For cases in which it has been held negligence to run a locomotive without a headlight, see *Daniels v. Staten Island Rapid Transit R. R.*, 7 N. Y. Sup. N. E. Rep. 725 (1890); *Becke v. Missouri Pacific R. R.*, 102 Mo. 544.

¹ *Norfolk & Western R. R. v. Burge*, 84 Va. 63.

² *Guggenheim v. Lake Shore & Mich. So. R. R.*, 66 Mich. 150; *Philadelphia, W. & B. R. R. v. Hogeland*, 66 Md. 149.

³ *Roberts v. Alexandria & F. R. R.*, 83 Va. 312.

⁴ *Cooper v. Lake Shore & Mich. So. R. R.*, 66 Mich. 261.

⁵ *Shelby v. Cincinnati, N. O. & T. P. R. R.*, 3 S. W. Rep. 157 (Ky. 1887); *Pinney v. Mo., K. & T. R. R.*, 71 Mo. App. 577.

⁶ *Chicago, Burlington & Q. R. R. v. Perkins*, 125 Ill. 127.

⁷ *Baltimore & Ohio R. R. v. Anderson*, 43 U. S. App. 673.

⁸ *State v. Boston & Maine R. R.*, 80 Maine, 430; *Wilson v. New York, N. H. & H. R. R.*, 18 R. I. 491; and see *Brown v. Rome, Watertown, & Ogdensburg R. R.*, 1 N. Y. Sup. N. E. Rep. 286 (1888).

whether the crossing be over a public highway, or whether it be a private crossing, the customary user of which is known to and permitted by the defendant.¹ It is often held that, in the absence of a statutory requirement, the omission on the part of a railroad to ring bells, blow whistles or display a flag at a crossing, is not, as matter of law, negligence;² and there is a line of cases which hold that the failure of the defendant railroad to give the signals required by a statute or ordinance is, *per se*, actionable negligence,³ but it is believed these cases are not to be justified upon legal principle,⁴ the sound rule being that the omission of the statutory signals, must be in order to make the defendant liable, the proximate cause of the injury; and that plaintiff must himself have been in the exercise of due care.⁵ And it is to be observed that the mere giving of the signals prescribed by law in any case, will not relieve the defendant if it be negligent in other respects.⁶ Ordinarily, it is a question of fact whether the warn-

¹ *Nash v. New York Cent. & H. R. R. R.*, 1 N. Y. Sup. N. E. Rep. 269 (1888); *Whalen v. Chicago & Northwestern R. R.*, 75 Wis. 654; *Westaway v. Chic., St. P. & C. R. R.*, 56 Minn. 580; *Bergman v. St. Louis, I. Mt. & So. R. R.*, 88 Mo. 678; *Bryne v. New York Cent. & H. R. R. R.*, 104 N. Y. 362. For a case in which it was held by the majority of the court that the circumstances, and the surroundings of the crossing were such as not to require the railroad to give signals on approaching it, see *Philadelphia, W. & B. R. R. v. Fronk*, 67 Md. 339.

² *Vandewater v. N. Y. & N. E. R. R.*, 135 N. Y. 583; *Dundon v. N. Y., N. H. & H. R. R.*, 67 Conn. 266; *Northern Central R. R. v. Medairy*, 86 Md. 169; *Omaha & R. V. R. R. v. Brady*, 39 Neb. 27; but see *Gilmore v. Cape Fear & V. R. R.*, 115 N. C. 657.

³ *Atchison, Topeka & S. F. R. R. v. Townsend*, 39 Kan. 115; *Brown v. Griffin*, 71 Tex. 654; *Nuzum v. Pittsburg, C. & St. L. R. R.*, 30 W. Va. 228; *Petrie v. Columbia & G. R. R.*, 29 S. C. 303; *Bitner v. Utah Central R. R.*, 4 Utah, 502; *Green v. Eastern Railway*, 52 Minn. 79; *McNown v. Wabash R. R.*, 55 Mo. App. 585; *Littlejohn v. Rich. & D. R. R.*, 45 S. C. 181; *Wragge v. S. C. & Geo. R. R.*, 47 S. C. 105; *Chic., R. I. & Pac. R. R. v. Caulfield*, 27 U. S. App. 358; *Bittle v. Camden & A. R. R.*, 55 N. J. L. 615.

⁴ See § 112, *ante*.

⁵ *Horn v. Balt. & Ohio R. R.*, 54 Fed. Rep. 301, 4 C. C. A. 346. See *Sala v. Chic., R. I. & Pac. R. R.*, 85 Iowa, 678.

⁶ *Thompson v. New York Cent. & H. R. R. R.*, 110 N. Y. 636; *Chicago, R. I. & Pac. R. R. v. Caulfield*, 27 U. S. App. 358; *Louisville & Nashville R. R. v. Coleman*, 86 Ky. 556.

ings required by the statute to protect travellers at railway crossings are sufficient, or whether additional safeguards are necessary. But in order to find the railroad negligent in not furnishing additional safeguards, there must be circumstances, as the configuration of the land, the neighboring structures, the number of trains, the amount of travel on the highway, which make the statutory signals inadequate properly to warn the public of danger.¹

§ 124. *Invitation to Passenger, express or implied, Effect of.* — If a passenger directs his course, whether entering or leaving a train, by the direction, or express or implied invitation, of the corporation, and by reason of a defect or imperfection in the structures over which he passes, which might have been guarded against by the exercise of due care on the part of the corporation, he is injured, the corporation will be responsible for such injury. Nor will the liability be removed by the fact that the route which the passenger takes is not the most direct way to the highway, nor by the fact that the passenger intends to pursue a course over the railroad which he has no right to take. For the passenger is not a trespasser or mere licensee at the time and place when and where he is injured, merely because he intends, afterwards, to become either one or the other. Thus a railroad was held liable for injuries occasioned to a passenger by the unsafe condition of the platform at a station along which he was walking after alighting from a train for the purpose of leaving a station to go to his home; the platform being fitted and intended for the use of passengers, and so arranged as to invite them to use it, although the railroad was not under obligation to furnish such a platform, and the nearest egress to the highway was in another direction; and the passenger intended after leaving the platform to cross the railroad at a place where he had no right to cross.² It is to be observed that the fact that the

¹ Hubbard v. Boston & Albany R. R., 162 Mass. 132.

² Keefe v. Boston & Albany R. R., 142 Mass. 251. In this case, Field, J., said: "The well known usages of railroad companies and of the public make it impossible to hold as matter of law, that it was the duty of the plaintiff, immediately on leaving the cars at the station, to take the shortest practicable course to the nearest highway, and that, if

passenger does the act which results in his injury at the invitation of the defendant's servants, does not relieve him from the necessity of proving due care on his own part. Thus where a railroad placed a movable bench at the foot of its car-steps on which passengers leaving the car might alight, and it was in an unsafe condition, which fact was known to the plaintiff, who, nevertheless, alighted upon it and was injured, it was held that she was negligent.¹ Where one was injured by alighting from a railway train while in motion as it was approaching a station in the night time, it was contended that the action of the brakeman in calling out the name of the station and fastening back the door of the car before the train had stopped was an invitation to the plaintiff to alight. But it was held that this was clearly not an invitation to alight from a moving train, but from a train which had come to a stop, and, under the circumstances of the case, it was held that the plaintiff was guilty of contributory negligence.² When the act is done by invitation,

she did not, she became a trespasser or licensee only. The defendant was bound to keep in safe condition for its passengers all that part of the stations and platforms where passengers were expressly or impliedly invited to go; and was bound by its servants and agents to exercise due care towards passengers using its station and platforms by invitation. . . . The intention in her mind of crossing the railroad where she had no right to cross had not become an act, and she might never have acted in accordance with that intention. She was still a passenger leaving the station of the railroad, and may have been walking upon a part of the platform intended for the use of passengers." It is apprehended that, in the United States, the stopping of a train and the announcement of a trainman of the name of a station will be taken to be an invitation to the passenger to alight, see *Columbus & I. C. R. R. v. Farrell*, 31 Ind. 408; but it is held in England that it is a question for the jury whether the calling out of the name of a station will amount to such an invitation. *Whittaker v. Manchester & S. R. R.*, 5 C. P. 464 n., and see *Cockle v. London & Southeastern Railway*, 5 C. P. 457. Where the defendant's servant, a brakeman, invited and endeavored to assist the plaintiff, a boy of fifteen, to jump upon a train moving at the rate of fifteen miles an hour, and the boy, in consequence, was injured, it was held that the defendant was responsible. *Western & Atlantic R. R. v. Wilson*, 71 Ga. 22, and see *Philadelphia Traction Co. v. Orbann*, 119 Penn. St. 37.

¹ *McDermott v. Chic. & Northwestern R. R.*, 82 Wis. 246.

² *England v. Boston & Maine R. R.*, 153 Mass. 490. See also *Lewis*

and results in injury, the question of the plaintiff's negligence is generally one of fact.¹

SECTION III.

OF OWNERS OR KEEPERS OF ANIMALS.

§ 125. **General Rules applied.**—A person having an animal under his custody and control is bound, whatever may be the character and disposition of the animal, to exercise that measure of care and watchfulness in regard to it which an ordinarily prudent man ought to exercise in similar circumstances. Thus it is held to be negligence in the driver of horses to fail to look to see where he is going while driving at a trot.² So it was held negligence to leave a high-spirited horse unhitched in the thickly populated part of a city;³ and so to leave a horse and wagon, unguarded, at night, on the track of an electric railway;⁴ and it is said to be negligent, under any circumstances, as matter of law, to leave horses or mules untied in the public streets.⁵ But it is apprehended that the character of the place, as being frequented or unfrequented, and the disposition of the animal must, in such

v. London, Chatham & Dover Railway, L. R. 9 Q. B. 66; *Bridges v. North London Railway*, L. R. 6 Q. B. 377; *Chaffee v. Boston & Lowell R. R.*, 104 Mass. 108; *Wheelock v. Boston & Albany R. R.*, 105 Mass. 203; *Robostelli v. New York, N. H. & H. R. R.*, 33 Fed. Rep. 796.

¹ See *Northern Pac. R. R. v. Egeland*, 12 U. S. App. 271; *Hartzig v. Lehigh Valley R. R.*, 154 Penn. St. 364; *Victor v. Penn. R. R.*, 164 Penn. St. 195; *Deery v. Camden & A. R. R.*, 163 Penn. St. 403; *Dennis v. Pittsburg & C. R. R.*, 165 Penn. St. 624.

² *Moebus v. Hermann*, 108 N. Y. 349, 352; *Gulick v. Clark*, 51 Mo. App. 26. A failure to take up ordinary precautions in driving across a street railway track is negligence. *Graff v. Detroit, &c. Railway*, 109 Mich. 77.

³ *Griffiths v. Cliff*, 4 Utah, 462, and see *Hill v. Scott*, 38 Mo. App. 370; *Hudson v. Houser*, 123 Md. 309; *McMahon v. Kelly*, 9 N. Y. Sup. N. E. Rep. 544 (1890); *Higgins v. Wilmington City Railway*, 1 Marv. (Del.) 305. See *Murdock v. N. Y., &c. Express Co.*, 167 Mass. 549.

⁴ *Gilmore v. Federal St. Railway Co.*, 153 Penn. St. 31. See *Kestner v. P. & B. Traction Co.*, 158 Penn. St. 422.

⁵ *Bowen v. Flanagan*, 84 Va. 313. See *Phillips v. Dewald*, 79 Ga. 732.

cases, be circumstances which bear upon the question of negligence, so that the question must often be one of fact for the determination of the jury.¹

§ 126. **Owner's Responsibility as affected by Knowledge.**— In a case in the Supreme Court of the United States, after much consideration, the following rules were laid down as fixing the responsibility in different cases for injuries inflicted by animals, so far as such responsibility is affected by notice on part of the owner of the nature or character of the animal;² 1. The owner or keeper of a domestic animal is not liable, on the ground of negligence, for injury inflicted by such animal, unless it be proved that he knew that the animal was accustomed to do mischief.³ 2. If the animal be *ferae naturae*, the owner, without notice, is liable if the animal get loose and do harm.⁴ 3. If a domestic animal is accustomed to injure people, the owner must be affected with notice of the animal's vicious propensity in order to charge him.⁵ But

¹ Doyle v. Detroit Omnibus Co., 105 Mich. 195.

² Congress & Empire Spring Co. v. Edgar, 99 U. S. 645.

³ See Rex v. Huggins, 2 Ld. Raym. 1574; Fleming v. Orr, 29 E. L. & E. 16; Vrooman v. Lawyer, 13 Johns. 339; Buxondin v. Sharp, 2 Salk. 662; Earl v. Van Alstine, 8 Barb. 630; Cockerham v. Nixon, 11 Ired. 269; Dearth v. Baker, 22 Wis. 73; Smith v. Causey, 22 Ala. 568. In Earl v. Van Alstine, *supra*, Selden, J., said: "I apprehend that if a person chooses to keep a domestic animal, as a dog, which is naturally savage and dangerous, he does so at his peril, and that he would be liable for any injury done by such dog without evidence that he had ever done mischief before." See also expressions by Abbot, J., in Judge v. Cox, 1 Stark. 285, and by Lord Ellenborough in Hartley v. Harriman, 1 B. & Ald. 620.

⁴ See Worth v. Gilling, L. R. 2 C. P. 3; May v. Burdett, 9 Q. B. 101; Besozzi v. Harris, 1 F. & F. 92; Scribner v. Kelly, 38 Barb. 14. It is said that the substance of the rule is that one who keeps lions, tigers, or other fierce and dangerous animals is liable, at all events, for any injury they may do, and that the words *ferae naturae* add nothing of any value to the rule, but rather tend to mislead, as they are descriptive of many animals that are not ferocious or dangerous. Per Selden, J., in Earl v. Van Alstine, 8 Barb. 630, 633. Inducing the plaintiff to ride a horse which the defendant knows to be vicious, is actionable. Lane v. Minn. State Agric. Soc., 62 Minn. 175.

⁵ Mason v. Keeling, 1 Ld. Raymond, 606, 12 Mod. 332; Rex v. Huggins, 2 Ld. Raymond, 1574; Jackson v. Smithson, 13 M. & W. 561; Cox

if he has notice of such propensity, he will be liable without reference to any specific negligence in the matter of custody.¹

4. In the case of domestic animals, as oxen or horses, rightfully in the place where the injury is inflicted, *scienter* must be alleged and proved in order to charge the owner.² In some cases it may appear that the animal causing the injury is of a disposition which, in one set of circumstances, may render it dangerous, while, ordinarily, it could not be presumed to be so. In such cases it may become an essential question whether the defendant, under the circumstances of the particular case, exercised a due care and custody of the animal.³ The disposition of the animal is shown by its general behavior antecedent to the injury,⁴ and it is sufficient to charge the owner with negligence if his knowledge of the animal's disposition was such as to convince an ordinarily prudent man that it was dangerous.⁵ It is not neces-

v. Burbridge, 13 C. B. (N. S.) 430; *Hudson v. Roberts*, 6 Exch. 699; *Lyons v. Merrick*, 106 Mass. 71; *Van Leuven v. Lyke*, 1 N. Y. 575; *Moynahan v. Wheeler*, 117 N. Y. 285; *State v. Donahue*, 49 N. J. L. 548; *Murphy v. Preston*, 5 Mackey, 514; *Cox v. Murphy*, 82 Ga. 623.

¹ See *Smith v. Pelch*, 2 Str. 1264; *Blackman v. Simmons*, 3 C. & P. 138; *Sarch v. Blackburn*, 4 C. & P. 297; *Kittredge v. Elliott*, 16 N. H. 77; *Arnold v. Norton*, 25 Conn. 92; *Shirley v. Bartley*, 4 Sneed, 58; *McCaskill v. Elliott*, 5 Strob. 190; *Fairchild v. Bentley*, 30 Barb. 147; *Kelley v. Tilton*, 2 Abb. Ct. App. Cas. 495; *Lawrence v. Mangianti*, 41 Cal. 138; *Meibus v. Dodge*, 38 Wis. 300; *Koney v. Ward*, 2 Daly, 285; 36 How. Pr. 255; *Earheart v. Youngblood*, 27 Penn. St. 337; *Stumps v. Kelly*, 22 Ill. 140; *Popplewell v. Pierce*, 10 Cush. 509. In such cases, the jury may presume that the defendant was possessed of common knowledge in regard to the propensities of the animal. *Linnehan v. Sampson*, 126 Mass. 506.

² *Van Leuven v. Lyke*, 1 N. Y. 515; *Decker v. Gammon*, 44 Maine, 322; *Dearth v. Baker*, 22 Wis. 73; *Jackson v. Smithson*, 15 M. & W. 563; *Card v. Case*, 5 C. B. 632; *Hudson v. Roberts*, 6 Exch. 697; *Cox v. Burbridge*, 13 C. B. (N. S.) 430.

³ *Linnehan v. Sampson*, 126 Mass. 506. See also *Hewes v. McNamara*, 106 Mass. 281; *Clowdis v. Flume & Irrigation Co.*, 118 Cal. 315.

⁴ *Kennon v. Gilmer*, 131 U. S. 22. See also *Chamberlain v. Enfield*, 43 N. H. 356; *Todd v. Rowley*, 8 Allen, 51; *Maggi v. Cutts*, 123 Mass. 535.

⁵ *Kittredge v. Elliott*, 16 N. H. 77; *Godeau v. Blood*, 52 Vt. 251; *Reynolds v. Hussey*, 64 N. H. 64; *Buckley v. Leonard*, 4 Denio, 500;

sary, in order to fix the owner's liability, to show that the animal has inflicted similar injuries before.¹ The question of knowledge is ordinarily one of fact for the jury to determine.² Generally, in order to charge the owner, it is sufficient to show that his servants or agents had notice of the vicious disposition of the animal.³ There is a class of cases in which actual knowledge on the part of the defendant is not necessary in order to charge the defendant, even although the animal, through the viciousness of which the accident happened, is a domestic animal. Thus if a person furnishes an animal for the use of another for hire, he making it his business to let such animals, it is his duty to furnish a suitable animal, and, in an action brought for a breach of such duty, it is not necessary to show that the defendant knew, in fact, that the animal was vicious, in order to support the action. So if a horse is hired of a livery-stable keeper for a special purpose known to him, it is a part of the contract that the horse shall be suitable for such purpose; and if he furnishes one which is in fact unsuitable, and thereby injury is caused to the plaintiff, it is no defence to the action that the defendant did not know that the horse was unsuitable or vicious.⁴ In these cases the plaintiff's action is, in effect, founded upon a breach of an implied warranty; and, in cases in which the defendant was guilty of actual negligence, as in letting a horse which he knew to be vicious, it is obvious that the

Rider v. White, 65 N. Y. 54; *Keightlinger v. Egan*, 65 Ill. 235; *Judge v. Cox*, 1 Stark. 285; *M'Caskill v. Elliott*, 5 Strobh. 596; *Applebee v. Percy*, L. R. 9 C. P. 647.

¹ See cases cited *ante*, and *Brice v. Bauer*, 108 N. Y. 428.

² *Godeau v. Blood*, 52 Vt. 251; *Buckley v. Leonard*, 4 Denio, 500. In this case it was held, where the owner of a dog which had bitten other persons had notice of the fact, and afterwards suffered the dog to be at large, that it was not an answer to an action for the injury to the plaintiff, that the dog was generally inoffensive. So in *Smith v. Pelch*, 2 Strange, 1264, Lee, C. J., said: "If a dog has once bit a man, and the owner, having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person treading on the dog's toes; for it was owing to his not hanging the dog on the first notice."

³ *Applebee v. Percy*, L. R. 9 C. P. 647; 43 L. J. C. P. 365.

⁴ *Horne v. Meakin*, 115 Mass. 326.

plaintiff may rely either upon the breach of the warranty or upon the actual negligence of the defendant, which negligence is in dereliction of the general duty which the defendant owes the public. In many States the statute provides for the recovery of damages, and in some cases of double damages, in favor of persons who are injured by the bite of a dog. These statutes generally enlarge the common-law liability, and make it unnecessary to prove knowledge on the part of the owner or keeper of the dog.¹

§ 127. **Mischievous Intent inferred in Certain Cases.** — If the owner or keeper of a ferocious animal, knowing its disposition, keep it improperly guarded or suffer it to run at large upon his own property, he will be answerable for injuries which it may inflict upon a person being in the exercise of due care, although such person be a trespasser,² the principle being that such injuries fall within the class of those which the law regards as wantonly or maliciously inflicted. And this is so although the animal be accidentally irritated by the person injured ;³ and if the person injured be a child, it seems to be immaterial that the act of the child in irritating the animal was intentional, since the child is only held to the exercise of that degree of care of which it is capable.⁴ But if an adult person willfully provokes the animal, and so is injured by it, he cannot recover.⁵ Where the injured person incited or interfered with a dog, and was bitten, it is necessary for

¹ See *Wolfe v. Chalker*, 31 Conn. 121; *Pressey v. Worth*, 3 Allen, 191; *Galvin v. Parker*, 154 Mass. 346.

² The rule has often been applied in the case of ferocious dogs left to run at large by their owners. See *Brock v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 C. & P. 297; *Loomis v. Terry*, 17 Wend. 496. In *Marble v. Ross*, 124 Mass. 44, the same rule was held where a trespasser was injured by a ferocious bull kept in the defendant's pasture. It has been said that one keeping, knowingly, a vicious dog, which injures a traveller, is guilty of "wilful negligence," and cannot set up plea of contributory negligence on the part of the traveller. *Jones v. Carey*, 9 Houst. (Del.) 214. But see § 92, *ante*.

³ As where the plaintiff accidentally trod upon a savage dog, which thereupon bit him. *Smith v. Pelch*, 2 Str. 1264.

⁴ *Plumley v. Birge*, 124 Mass. 57.

⁵ *Keightlinger v. Egan*, 65 Ill. 235.

him, in order to recover damages, to show that he was not guilty of negligence in so interfering; and this is so when he interferes with dogs that are fighting, the question how far his interference was justifiable being generally for the jury.¹ The ordinary rule which requires the plaintiff, in an action for personal injuries, to allege and prove by positive testimony negligence on the part of the defendant, does not apply in the case of injuries committed by a vicious or dangerous animal in the defendant's charge or control. For although the defendant's liability in such cases rests, as in others, upon the ground of negligence, this is implied from the mere keeping, without actual notice, in cases where the dangerous disposition and habits are universal among the species, as in the case of wild and savage beasts. Where the animal is in fact vicious or dangerous, though not of an untamed or vicious species, it is necessary to allege and prove such disposition, and that the owner knew it.² But in neither case, is it necessary to allege or prove negligence specially, this being an inference of law from the fact of the keeping.³

§ 128. **Person who keeps the Animal, although not its Owner, liable.** — Since the liability for injuries committed by animals rests wholly upon the ground of actual or assumed negligence, the actual ownership of the animal is immaterial, and the person in the place of the owner and who by contract with him has the exclusive custody and control of the animal, is liable for the injuries which he carelessly permits it to commit.⁴ So one who wilfully harbors an animal, although without the owner's knowledge or consent, thereby becomes

¹ *Matteson v. Strong*, 159 Mass. 497; *Raymond v. Hodgson*, 161 Mass. 184.

² *Lyons v. Merrick*, 105 Mass. 71.

³ *Popplewell v. Pierce*, 10 Cush. 509.

⁴ *Lyons v. Merrick*, 105 Mass. 71. It is held that a statute (Pub. St. Mass. c. 102, § 93) providing that every owner "or" keeper of a dog shall be liable to any one injured thereby, does not create a joint or several liability; and a person who brings an action against the owner, but fails to collect his judgment on account of the latter's insolvency, cannot afterwards bring an action against the keeper. *Galvin v. Parker*, 154 Mass. 346.

responsible for injuries which he carelessly permits it to inflict.¹ But the rule will be otherwise if he has tried unsuccessfully to keep the animal off his premises.² Generally if one permits his servants or agents to keep an animal upon his premises, he will himself be responsible as a keeper of such animal; and if he knows that it is so kept his assent to the keeping will be implied.³

SECTION IV.

OF PERSONS HAVING THE CUSTODY AND CONTROL OF DANGEROUS ARTICLES, ETC.; PHYSICIANS.

§ 129. **Generally: Intrusting Dangerous Articles to Others.** — When one has in his possession or control dangerous articles, substances, or agents, he is bound to a measure of care in respect of them which shall be proportionate to the danger which may result to others from the misuse or careless handling of them. Thus the care of persons blasting rocks must be such as ordinarily prudent persons would use, under the circumstances;⁴ as, in populous or frequented places, to cover the blast and so restrict the effect of the explosion, if practicable; or to give timely warning to all persons who may appear to be exposed to danger from it.⁵ And, if one delivers and intrusts the keeping of combustibles, explosives, loaded firearms, chemicals, or poisons, or other articles which he knows, or ought to know, to be dangerous, to another who manifestly is of insufficient capacity to be trusted with such articles, the person so delivering them is responsible for injuries thereby resulting, either to the person to whom they are delivered, or to third parties. Thus, where one

¹ *Marsh v. Jones*, 21 Vt. 378; *Wilkinson v. Parrott*, 32 Cal. 102; *Frammell v. Little*, 16 Ind. 251.

² *Smith v. Great Eastern Railway*, L. R. 2 C. P. 4, 36 L. J. C. P. 22.

³ *Barrett v. Malden & Melrose R. R.*, 3 Allen, 101.

⁴ *Mills v. Wilmington City Railway*, 1 Marv. (Del.) 269.

⁵ *Blackwell v. Lynchburg & D. R. R.*, 111 N. C. 151; *Gates v. Latta*, 117 N. C. 189.

intrusted a loaded gun to a young maid-servant, and she carelessly shot the plaintiff with it, it was held to be a question for the jury whether the defendant was negligent in intrusting the gun to the servant under the circumstances, and that if he was so negligent the plaintiff was entitled to recover.¹ So, where one sold and delivered gunpowder to a child eight years old, and he, in ignorance of its effects, and using all the care of which he was capable, exploded it and was injured by the explosion, it was held that the injury was the natural and proximate result of the defendant's negligence in selling a dangerous article to a child who, probably, as the defendant had reason to know, might ignorantly and innocently play with it to his own injury.² So if one knowingly intrusts dangerous articles to be handled, sold, or distributed by an insane person, he will be liable for injuries thus resulting to innocent third parties.³ A contractor to furnish fireworks for a public exhibition is responsible for injuries resulting from the careless setting off such fireworks by his servants.⁴

§ 130. As to Dangerous Articles concealed: Rule Illustrated in Case of Carriers. — If one delivers an article which he knows to be dangerous, but the dangerous quality of which is concealed or not apparent upon fair inspection, to another ignorant of danger, and injury thereby result to the person to whom it is delivered, or his servant, being in the exercise of due care; the person delivering the article will be responsible for the injury. This liability does not rest upon privity of contract between the parties, but upon the duty of every man so to use his own property as not to injure the persons or prop-

¹ *Dixon v. Bell*, Stark. R. 287, 5 M. & S. 198.

² *Carter v. Towne*, 98 Mass. 567. The court say: "The case cannot be distinguished in principle from that of a man who delivers a cup of poison to an idiot or puts a razor into the hands of an infant in its cradle. The want of any direct intention to injure does not excuse the defendants."

³ *Cole v. Nashville*, 4 Sneed, 162. In this case, a municipal corporation, knowing a person to be insane, had licensed him to follow within its limits the avocation of apothecary, and it was held that the corporation was liable for injuries caused to a third person by an act of the insane person done in the pursuit of his business.

⁴ *Colvin v. Peabody*, 155 Mass. 104.

erty of others.¹ And in such cases, the absence, on the part of the defendant, of any direct intention to injure will not excuse him if he has in fact injured the plaintiff, since every man must be taken to contemplate the natural and probable consequences of his own acts.² And although, when a right or duty is created wholly by contract, it can be enforced only as between the contracting parties, yet when the defendant has violated a duty imposed upon him by the common law, he is to be held liable for every injury which is the natural and probable consequence of his negligent act. These principles have often been applied where explosive or dangerous substances have been delivered to a common carrier for transportation, without informing him of their nature.⁴ Thus one who delivered a carboy which he knew to contain nitric acid to a carrier without informing him of the nature of its contents, was held liable for an injury resulting by reason of the leaking of the acid, to another carrier to whom the carboy had been delivered by the first carrier, to be conveyed to its destination in the ordinary course of business.⁵ It is held, as matter of law, to be the duty of the sender of a dangerous article by a common carrier, to give the carrier notice of its character. This obligation rests upon the principle already stated, and expressed in the maxim *Sic utere tuo ut alienum non laedas*, not upon any contract express or implied.⁶

§ 131. **Further Illustrations of the Rules Stated; Gas: Electricity.**—The rule stated has been applied to a variety of

¹ *Carter v. Towne*, 98 Mass. 567, and see §§ 3, 5, 6, *ante*, notes and cases cited.

² Per Lord Ellenborough, in *Townsend v. Wathen*, 9 East, 280.

³ *McDonald v. Snelling*, 14 Allen, 290, 294, and see §§ 3, 5, 6, 11, 113, 116 *et seq.*, *ante*, notes and cases cited.

⁴ *Williams v. East India Co.*, 3 East, 192; *Brass v. Maitland*, 6 El. & Bl. 470; *Mayor of Colchester v. Brooks*, 7 Q. B. 377; *Longmeid v. Holiday*, 6 Exch. 767; *Grizzle v. Frost*, 3 F. & F. 622; *Vaughan v. Menlove*, 7 C. & P. 525; *Carter v. Towne*, 98 Mass. 567; *McGrew v. Stone*, 53 Penn. St. 436.

⁵ *Farrant v. Barnes*, 11 C. B. (N. S.) 533; *Boston & Albany R. R. v. Shanley*, 107 Mass. 568, and see cases cited *supra*.

⁶ See cases cited *supra*.

cases. An apothecary who sold a bottle of liquid, made up of ingredients known only to himself, representing it to be fit to be used in washing the hair, was held to be liable for an injury resulting to the purchaser's wife from her using it for that purpose.¹ So, where the defendant, knowing that naphtha was explosive and dangerous to life when used for illuminating purposes, sold it to a retailer of fluids to be used for such purposes, knowing that the latter intended to retail it in his business; and a customer of the retailer, in ignorance of its dangerous qualities, purchased a portion of it and attempted to burn it in a lamp, when it exploded and injured him; it was held that the injured person had a good action against the defendant at common law.² Where a druggist by mistake put up in packages a quantity of deadly poison, and labelled these with the name of a harmless medicine, and put the packages upon the market, it was held that he was liable in damages after one of the packages had passed through several intervening hands to an apothecary, of whom the plaintiff purchased it and administered it to his wife, who used it as a

¹ *George v. Skivington*, L. R. 5 Exch. 1.

² *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64. It was held in this case that there was no conclusive presumption that either the retailer or his customer was aware of the danger of burning naphtha for illuminating purposes. In many of the States the statute provides for a civil or criminal action, or both, against sellers of naphtha or illuminating oils below a specified standard of quality. Under such a statute, which provided that no person should sell naphtha or illuminating oils below a prescribed standard, and that any person so selling "shall . . . be punished by fine or imprisonment, . . . and shall also be liable . . . to any person suffering damage from the explosion or ignition of such oil . . . unlawfully sold or kept," and also providing for the inspection of illuminating oils; it was held, in a civil action brought under the statute, that the defendant was liable, although an authorized inspector had certified that the oil sold conformed to the prescribed standard or that the defendant was ignorant that, in fact, it did not so conform. *Hourigan v. Nowell*, 110 Mass. 470. And the same rule obtains in a criminal action under the statute. *Commonwealth v. Wentworth*, 118 Mass. 441. But it seems that in the civil action at common law the *scienter* is of the gist of the action. See cases cited *ante*. It is not negligence, *per se*, for one to keep a barrel of paint containing benzine on his premises, for use in his business. *Burke v. Parker*, 107 Mich. 88.

harmless medicine, being deceived by the false label.¹ It is the duty of corporations or individuals invested with the privilege of supplying the community with light for illuminating purposes to exercise due care and diligence in keeping the illuminating gas under their control, and preventing it from escaping into habitations or frequented buildings.² And this duty exists although the occupant of the building be also charged with the duty of giving notice of the escape of gas to the gas-light company.³ A gas company using a cracked or defective pipe, after notice, is responsible for resulting injuries.⁴ If the company sends its servant to repair a leak in a pipe, it being its duty so to do, and through the negligence of the servant, as by lighting a match in proximity to the escaping gas, injury ensue, the company is liable for the consequences.⁵ If such agent is ignorant or incompetent, the company is responsible; and this, although the service to be performed by the servant is, as to the plaintiff, gratuitous.⁶ And it seems that where a gas company, upon discontinuing its supply of gas to a customer, and removing the meter, fails so to close the service-pipe as effectually to prevent the escape of the gas into the building, it is guilty of negligence.⁷ So, under the revised Civil Code of Louisiana, providing that one shall be liable for damages occasioned by his negligence, imprudence, or want of skill,⁸ and providing for damages caused

¹ *Thomas v. Winchester*, 2 Seld. 397, and see also *Norton v. Sewall*, 106 Mass. 143; *Rafe v. Sommerbeck*, 94 Iowa, 656.

² *Emerson v. Lowell Gas Light Co.*, 3 Allen, 410. See *Schmeer v. Syracuse Gas Light Co.*, 147 N. Y. 529.

³ See *Hunt v. Lowell Gas Light Co.*, 1 Allen, 343.

⁴ *Richmond Gas Co. v. Baker*, 146 Ind. 600.

⁵ See *Consolidated Gas Co. v. Crocker*, 82 Md. 113; *Brady v. Consolidated Gas Co.*, 85 Md. 637.

⁶ *Lannen v. Albany Gas Light Co.*, 44 N. Y. 459, and see *Holden v. Liverpool Gas Co.*, 3 C. B. 1.

⁷ *Lanigan v. New York Gas Light Co.*, 71 N. Y. 29. See also *Smith v. Boston Gas Light Co.*, 120 Mass. 316; *Hemstead v. Phoenix Gas Light & C. Co.*, 3 H. & C. 745; *Devine v. Tarrytown, &c. Gas Light Co.*, 25 Hun, 231; *Cleveland v. Spier*, 16 C. B. (N. S.) 399; *Blenkirow v. Great Central Gas Cons. Co.*, 2 F. & F. 437; *Mose v. Hastings, &c. Gas Co.*, 4 F. & F. 325.

⁸ Art. 2316.

by things in the defendant's custody,¹ it was held that an electric company was liable for injuries occasioned by the explosion of the brass tube containing the insulated wire of an electric lighting system which was connected with an arc current outside, the proximate cause of the accident being the insufficiency of the fuse-catches to break the current when it became too strong.² If the authorized servant of a gas company informs the occupant of a room, in which the company has been duly notified of the existence of a leak, that he has remedied the leak and that the room is safe for occupancy, the company is liable for an injury occurring to the plaintiff immediately thereafter, by reason of such occupancy.³

§ 132. **The Rule carefully limited.** — But where an article in itself harmless, and dangerous only when combined with another, was sold by mistake, it was held that one who purchased it of a third party and mixed it in a combination which caused a dangerous explosion whereby he was injured, had no right of action for the injury against the original vendor. For it was not to be taken as a natural and probable consequence of the first sale that an article ordinarily innocuous would be mixed with another in an explosive combination, and a third

¹ Art. 2317.

² *Yates v. Brush Electric Light, &c. Co.*, 40 La. Ann. 467.

³ *Ferguson v. Boston Gas Light Co.*, 170 Mass. 182. The proprietor of a cellar, who knows, or ought to know that there is an accumulation of gas therein, is liable to one who, lawfully entering the cellar, is injured thereby. *Finnegan v. Fall River Gas Works Co.*, 159 Mass. 311. If the insulation of an electric wire placed on a building by an electric light company is gone, and has been gone for such a length of time that the company ought to have known of it, this fact is evidence of the negligence of the company, competent to be submitted to a jury in an action for an injury caused by the condition of the wire. See *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583; *Hector v. Boston Electric Light Co.*, 161 Mass. 558. It is negligence for an electric lighting company to leave uninsulated telephone wire in the public street where persons passing may be exposed to contact with it. *Dillon v. Allegheny County Light Co.*, 179 Penn. St. 482. It is said that while the owner of property is not generally obliged to protect trespassers thereon, yet the rule may be qualified when an owner operates such a dangerous force as electricity. *Newark Electric Light, &c. Co. v. Mason*, 39 U. S. App. 416.

party be thereby injured.¹ So, a manufacturer who uses in dyeing his cloths a common mordant, which, so far as known, has never caused injury to one merely handling cloths dyed therewith, and which he had no reason to suppose to be injurious, is not liable to a purchaser poisoned by handling the cloth.² If, however, a person delivering a dangerous article to another ought reasonably to have foreseen the likelihood of its being placed in a combination which would render it dangerous, he may be liable. Thus, two substances, manufactured by different persons, were dangerously explosive only in combination with each other, and were ordinarily used together. A customer sent separate orders to the respective manufacturers for quantities of each substance to be sent him by a common carrier. The substances were accordingly delivered to the carrier, in apparently harmless packages, by the manufacturers, each acting independently and being ignorant of the other's proceedings, and neither notified the carrier of the nature of the substance. The carrier placed the packages, for conveyance, together, in his vehicle, where they exploded and injured the plaintiff. In an action brought by the plaintiff against the customer who ordered the packages, and the respective manufacturers, it was held that, upon the facts, the customer was not liable, but that the manufacturers were jointly liable for the injury suffered by the plaintiff, it being impossible to ascertain how much of the injury was produced by one of the substances and how much by the other. The court said: "Each party violated his duty none the less because he was ignorant as to what other articles were to be carried in the same car with his. By neglecting to give notice, he took the risk of any danger that might reasonably be apprehended from the proximity of other goods that the carriers might take in ignorance of the danger. If . . . duelin and exploders [the dangerous articles] are ordinarily used together, any person sending either of the two substances might reasonably apprehend that a quantity of the other substance might be carried with it."³

¹ Davidson v. Nichols, 11 Allen, 514, and see McDonald v. Snelling, 14 Allen, 290; Boston & Albany R. R. v. Shanley, 107 Mass. 568.

² Gould v. Slater Woolen Co., 147 Mass. 315.

³ Carney v. Shanley, 107 Mass. 568.

§ 133. **Physicians.** — A person who professes to be a physician undertakes, not to perform a cure in any case, but to bring to the exercise of his profession such reasonable measure of care and skill as is possessed, ordinarily, by other persons of the same profession.¹ And in determining the degree of skill to be exacted in any case, regard is to be had to the advanced state of the profession at that time.² If an ignorant person undertakes to act as a physician or surgeon, he may be responsible for the injurious consequences to the patient whom he assumes to treat.³ But one who, without special qualifications, and gratuitously, volunteers to attend the sick, can, at most, only be required to exercise the measure of skill and diligence usually exercised by persons of like qualifications under similar circumstances.⁴ It would seem that if a physician or surgeon feels himself incompetent to treat a case committed to him, it is his duty to recommend the patient to employ another physician or surgeon, when this is practicable; but if the physician or surgeon is competent and feels that he is competent to treat the patient, but is uncertain, or in doubt, as to the extent or nature of the patient's ailment, then he is

¹ *Lanphier v. Phipos*, 8 C. & P. 475; *Hancke v. Hooper*, 7 C. & P. 81; *Rich v. Pierpont*, 3 F. & F. 35; *Leighton v. Sargent*, 7 Foster, 460; *Wilmot v. Howard*, 39 Vt. 447; *Hathorn v. Richmond*, 48 Vt. 557; *Wood v. Clapp*, 4 Sneed, 65; *Ritchey v. West*, 23 Ill. 385; *Uteley v. Burns*, 70 Ill. 162; *Barnes v. Means*, 82 Ill. 379; *Landon v. Humphrey*, 9 Conn. 209; *Branner v. Stormont*, 9 Kan. 51; *Carpenter v. Blake*, 17 N. Y. S. C. 358; *Heath v. Glisan*, 3 Oregon, 64; *Gallagher v. Thompson*, Wright, 466; *Haire v. Reese*, 7 Phila. 138; *Howard v. Grover*, 28 Maine, 97; *Simonds v. Henry*, 39 Maine, 155; *Cayford v. Wilbur*, 86 Maine, 414; *Hastings v. Stetson*, 91 Maine, 229; *Dashiell v. Griffith*, 84 Md. 363; *McCracken v. Smathers*, 122 N. C. 799; *Link v. Sheldon*, 136 N. Y. 1. The physician will not be liable for a mere error in judgment. *Pike v. Housinger*, 155 N. Y. 201.

² *McCandless v. McWha*, 22 Penn. St. 261; *Small v. Howard*, 128 Mass. 131.

³ *Carpenter v. Blake*, 60 Barb. 488; *Higgins v. McCabe*, 126 Mass. 13; *Rex v. Spiller*, 5 C. & P. 333; *Ruddock v. Lowe*, 4 F. & F. 519; *Jones v. Fay*, 4 F. & F. 525; *Seare v. Prentice*, 8 East, 548; *Slater v. Barker*, 2 Wils. 359.

⁴ *Higgins v. McCabe*, 126 Mass. 13; *Leighton v. Sargent*, 11 Foster, 119; *Simonds v. Henry*, 39 Maine, 155; *Lanphier v. Phipos*, 8 C. & P. 475; *Hancke v. Hooper*, 7 C. & P. 81.

required to use his best judgment as to whether he will consult some other physician or surgeon.¹ If the negligence or unskilfulness of the physician is clearly the proximate cause of the injury suffered by his patient, the physician will be responsible therefor, although the patient, also, has been guilty of negligence in taking care of himself.² But if the plaintiff's own neglect and imprudence is a direct contributing cause, with the defendant's malpractice, of the injury complained of, the plaintiff will not be entitled to recover.³ It is, ordinarily, a question of fact for the determination of the jury whether the injury complained of is the result of the fault of the physician.⁴ The great weight of authority is in favor of the rule that if death ensues from the gross carelessness, ignorance, or rashness of a person who undertakes to administer medicine to another, although such person be a physician and act without express malice, his act may be manslaughter. Such cases fall within the class in which malice is said to be implied, and the meaning of the legal fiction of implied malice is that a man may be criminally responsible for consequences which he neither intended nor anticipated.⁵

¹ See *Mallen v. Boynton*, 132 Mass. 443.

² See *Hibbard v. Thompson*, 109 Mass. 286, § 98, *ante*.

³ *Feeney v. Spaulding*, 89 Maine, 111; *Styles v. Tyler*, 64 Conn. 432; *Richards v. Willard*, 176 Penn. St. 181.

⁴ See cases cited *supra*.

⁵ *Webb's Case*, 2 Lewin, 196; *Rex v. Williamson*, 3 C. & P. 635; *Tessymond's Case*, 1 Lewin, 169; *Rex v. Simpson*, Willcock, Med. Prof., Part 2, ccxxvii; *Rex v. Long*, 4 C. & P. 398; *Rex v. Spiller*, 5 C. & P. 333; *Rex v. Senior*, 1 Moody, 346; *Queen v. Spilling*, 2 M. & R. 107; *Regina v. Whitehead*, 2 C. & K. 202; *Regina v. Crick*, 1 F. & F. 519; *Regina v. Crook*, 1 F. & F. 521; *Regina v. Markuss*, 4 F. & F. 356; *Regina v. Chamberlain*, 10 Cox, C. C. 486; *Regina v. McLeod*, 12 Cox, C. C. 534; *Commonwealth v. Pierce*, 138 Mass. 165; *Ann v. State*, 11 Humph. (Tenn.) 159; *State v. Hardister*, 38 Ark. 605. So far as expressions in the case of *Commonwealth v. Thompson*, 6 Mass. 134, are in conflict with this view of the law, these are not supported by other authority.

CHAPTER V.

OF CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF.

SECTION I.

LAW AND FACT : BURDEN OF PROOF.

§ 134. **Due Care generally : Defined.** — In order to recover for an injury on the ground of the negligence of another, it must appear that the injured person was in the exercise of due care in respect of the occurrence from which the injury arose; or that the injury was in no manner due to his own fault or want of care; in other words, that he was not guilty of contributory negligence.¹ This is true even in those jurisdictions in which it is considered that due care on the part of the plaintiff is to be presumed,² it being held that the presumption supplies the place of proof. "Care imports atten-

¹ *Butterfield v. Forrester*, 11 East, 60; *Hawkins v. Cooper*, 8 C. & P. 473; *Harlow v. Humiston*, 6 Cow. 189; *Tuff v. Warman*, 5 C. B. (N. S.) 573; 27 L. J. (C. P.) 322; 5 Jur. (N. S.) Exch. 222; *Witherly v. Regents Canal Co.*, 12 C. B. (N. S.) 2, 3 F. & F. 61; *Burkie v. New York Dry Dock Co.*, 2 Hall, 151; *Brownell v. Flagler*, 5 Hill, 282; *Brown v. Maxwell*, 6 Hill, 592; *Cook v. Champlain Transportation Co.*, 1 Den. 91; *Delafield v. Union Ferry Co.*, 10 Bosw. 216; *Thwings v. Central Park R. R.*, 7 Rob. 616; *Gonzales v. New York Central & H. R. R. R.*, 38 N. Y. 440; *Wilcox v. Rome, W. & O. R. R.*, 39 N. Y. 358; *Grippin v. New York Central R. R.*, 40 N. Y. 34; *Blunn v. Delaware, L. & W. R. R.*, 6 Hun, 303; *Toomey v. Turner*, 24 Hun, 590; *Brand v. Schenectady & Troy R. R.*, 8 Barb. 368; *Sheffield v. Rochester & Syracuse R. R.*, 21 Barb. 339; *Terry v. New York Central R. R.*, 22 Barb. 574; *Dascomb v. Buffalo & State Line R. R.*, 27 Barb. 221; *Bieseigel v. New York Central R. R.*, 33 Barb. 429; *Cox v. Westchester Turnpike Co.*, 33 Barb. 414; *Fowler v. Dorlan*, 24 Barb. 384; *Havens v. Erie R. R.*, 53 Barb. 328; *Keese v. New York, N. H. & H. R. R.*, 67 Barb. 205, and cases cited *infra*.

² See §§ 136, 137, *post*.

tion, heedfulness, caution, and to use or take any degree of care there must be some vigilance, some exertion of the faculties to preserve what is desirable to save, or to avoid the danger or avert the peril to which a person may be exposed. When there is no thought of what may happen as the consequence of the action or conduct of a party, and no vigilance or circumspection is exercised concerning it, there is no care; for care, in its very nature and signification, imports that to its existence there must be some degree of activity and caution.¹ The question always is whether, notwithstanding the plaintiff's negligence, the defendant, by the exercise of proper care, could have averted the accident.² And when it appears that the accident could not have happened but for the fact that the deceased unnecessarily put himself into a position of great danger, he is to be held guilty of contributory negligence.³ So, as between employer and employee, due care means the exercise of reasonable diligence, or such watchfulness, care, and foresight as ought, under all the circumstances of the case, to be practised by a careful and reasonable man.⁴ It is

¹ *Gilman v. Deerfield*, 15 Gray, 577.

² *Fulp v. Roanoke & So. R. R.*, 120 N. C. 525.

³ *Farmer v. Mich. Cent. R. R.*, 99 Mich. 131.

⁴ *Wabash Railway Co. v. McDaniels*, 107 U. S. 454. Due care is often defined as "such care and caution as an ordinarily prudent person would exercise under similar circumstances." *Austin & N. W. R. R. v. Beatty*, 73 Tex. 592. See, to the same effect, *Austin v. Ritz*, 72 Tex. 391. Instructing the jury that "care of a man of ordinary prudence" is "just such care as one of you similarly employed would have exercised under the circumstances," is error. *Louisville & Nashville R. R. v. Gower*, 1 Pickle (Tenn.), 465. In an instruction defining "ordinary care" as such care as persons of average prudence and caution would use under like circumstances, the word "average" should be omitted. *Marsh v. Benton County*, 75 Iowa, 469. One whose mind is merely dull, and who is capable of earning his livelihood, and apparently does not need the protection of a guardian to keep him from harm, is bound to use due and ordinary care for his personal safety; but if he is mentally unable to apprehend apparent danger and avoid it, another, knowing his condition, who negligently puts him in peril, cannot escape liability on the ground of contributory negligence. *Worthington v. Mencer*, 96 Ala. 310. The general rule as to contributory negligence is abrogated in Florida by Laws, c. 3744, § 1; which introduces "the modern doctrine of comparative negligence," providing that where contributory negligence is shown, the damages shall

often said that the plaintiff may recover, although his own negligence exposed him to the risk of injury, if the defendant, after he was made aware of the plaintiff's danger, might have averted it and failed to do so;¹ or, as the rule is sometimes expressed, if the defendant could by the exercise of reasonable diligence have avoided the injury, he will not be excused for his failure of duty by the contributory negligence of the defendant.² The rule thus expressed would seem to mean nothing more than that the defendant will be liable for his negligence if this was the proximate cause of the injury, although an antecedent cause was the negligence of the plaintiff.³

§ 135. **Burden of Proof : Massachusetts Rule.** — The rule as to the burden of proof upon the issue of contributory negligence is not uniform. In Massachusetts, it is held, in actions brought for personal injuries, as in all others, that the burden of proof is upon the plaintiff throughout, and so that in order to recover he must show that (1) the defendant was negligent, and (2) that the plaintiff was not negligent, or, as the rule is expressed in that State, that the plaintiff was in the exercise of due care.⁴ Thus both the essential propositions of the

be proportionally reduced. See *Florida Central R. R. v. Williams*, 37 Fla. 406. See § 102, *ante*. The courts of Illinois hold that "the question of the negligence of the person injured is entirely for the jury, and the court will not, as matter of law, lay down what precautions he ought to have taken." *Chicago, St. Louis & P. R. R. v. Hutchinson*, 120 Ill. 587, and see *Chicago v. McLean*, 133 Ill. 148, 1890, distinguished and limiting *Kewanee v. Depew*, 80 Ill. 119, and *Sandwich v. Dolan*, 133 Ill. 177, distinguishing *Aurora v. Hillman*, 90 Ill. 61. To the same effect, see *Columbus & W. R. R. v. Bradford*, 86 Ala. 574.

¹ *Healey v. Dry Dock, &c. R. R.*, 46 N. Y. S. C. 473.

² See *Radley v. London & Northwestern Railway*, L. R. 1 App. Cas. 754; *Kenyon v. New York Central & H. R. R. R.*, 5 Hun, 479; *Bahrenburg v. Brooklyn R. R.*, 56 Hun, 652; *Whireley v. Whiteman*, 1 Head (Tenn.), 610.

³ See §§ 100-103, *ante*, notes and cases cited.

⁴ *Smith v. Smith*, 2 Pick. 621; *Lane v. Crombie*, 12 Pick. 177; *White v. Winnissimmet Co.*, 7 Cush. 155; *Horton v. Ipswich*, 12 Cush. 488; *Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Spofford v. Harlow*, 3 Allen, 176; *Wright v. Malden & Melrose R. R.*, 4 Allen, 283; *Counter v. Couch*, 8 Allen, 436; *Callahan v. Bean*, 9 Allen, 401. For instances of the appli-

plaintiff's case are made affirmative, and, so far as the form of the rule is concerned, the necessity is not imposed upon the plaintiff of proving a negative proposition. It is said that the burden to prove due care is upon the plaintiff for the reason that this is a subordinate proposition, involved in the more general proposition upon which the plaintiff's right of action is founded, to wit, that the injury was caused by the negligent or wrongful act of the defendant. And if the facts show negligence on the part of both plaintiff and defendant, the defendant is not bound to show that the accident would have happened notwithstanding his own negligence.¹ But although this is, in form, an affirmative proposition, it is held that it is not necessary to prove it by affirmative testimony addressed directly to its support. If the whole testimony in the case, taken together, excludes all appearance of fault on the part of the plaintiff, the proposition of due care is proved as effectually as by affirmative testimony.² So far, therefore, as method of proof is concerned, it will be found that the practice is the same in Massachusetts, and in other States which have followed the same rules as to the technical burden of proof, as it in those jurisdictions where it is considered that contributory negligence, being a matter of defence, is to be pleaded and proved by the defendant. The application of the Massachusetts rule was well illustrated in an action brought against a gas company for injuries received by the inhalation of gas escaping from the defendant's pipes. The plaintiff, who was an infant too young to testify, occupied the same bed with his mother, and the door of the room in which they slept being broken open in the morning, the plaintiff was found insensible by the dead body of his mother, whose death had been caused by gas escaping from a crack in a pipe laid by the defendant through the street on which the plaintiff lived. There were no gas fixtures in the room, nor was there any evidence that the plaintiff or his mother had

cation of the rule in actions by employees, see *Riley v. Conn. River R. R.*, 135 Mass. 292; *Taylor v. Carew Mfg. Co.*, 140 Mass. 150. See §§ 150-154, *post*.

¹ *Murphy v. Deane*, 101 Mass. 455.

² *Mayo v. Boston & Maine R. R.*, 104 Mass. 137, and see cases cited *supra*.

notice or consciousness of the escaping gas in season to leave the room or to open the doors or windows. It appeared that the mother was a sober and prudent woman. It was held, since due care may be shown by evidence which excludes fault, that there was nothing in the case to exclude the inference that the mother and child, on the night of the accident, went to bed and to sleep in the usual manner with nothing to indicate that there was unusual exposure to injury, and that they were suffocated in their sleep, and that they were in the exercise of such care as prudent people ordinarily use under circumstances of exposure to injury from hidden and unsuspected causes.¹ It would seem in all cases where injury results from unexpected and unforeseen causes, that the burden of proof to show due care must be satisfied by showing that the plaintiff was where he had a lawful right to be, and, being there, behaved as prudent persons ordinarily behave. It would manifestly be absurd in such cases, in order to a recovery, to require proof by affirmative testimony that the injured person used special precautions against a danger the existence of which he was not bound to suspect. Such cases may be distinguished from those in which a plaintiff voluntarily puts himself in a dangerous place, or in which he is to be taken to know that danger may be anticipated.² The general proposition that the burden is on the plaintiff to show that he was in the exercise of due care appears to be held, generally, by the English courts,³ and by the courts of several of the States.⁴

¹ *Smith v. Boston Gas Light Co.*, 120 Mass. 316.

² *Smith v. Boston Gas Light Co.*, 120 Mass. 316. See § 137, *post*, notes and cases cited.

³ See *London, Brighton & South Coast Railway v. Walton*, 14 L. T.

⁴ *Trow v. Vermont Central R. R.*, 24 Vt. 487; *Lazelle v. Newfane*, 69 Vt. 306; *Birge v. Gardiner*, 19 Conn. 507; *Beers v. Housatonic R. R.*, 19 Conn. 566; *Kennard v. Burton*, 25 Maine, 49; *Moore v. Central R. R.*, 4 Zab. 284; *Mynning v. Detroit, L. & N. R. R.*, 67 Mich. 677; *Deikman v. Morgan's L. and T. R. & S. S. Co.*, 40 La. Ann. 787; *Hathaway v. Toledo, Wabash & W. R. R.*, 46 Ind. 25; *Toledo, Wabash & W. R. R. v. Brannagan*, 75 Ind. 490; *Cincinnati, Hamilton & D. R. R. v. Butler*, 103 Ind. 31; *Cincinnati, H & D. R. R. v. McMullen*, 117 Ind. 5; *Thomas v. Hoosier Stone Co.*, 140 Ind. 518; *Clements v. La. Electric Light Co.*, 44 La. Ann. 692.

§ 136. **Rule that Contributory Negligence is Matter of Defence.**

— In the earlier cases, the courts in New York appear to have followed the Massachusetts rule as to burden of proof upon the question of contributory negligence,¹ but the later rule in

(N. S.) 253; *Clayards v. Dethick*, 12 Ad. & El. N. S. 439, 447; *Gough v. Bryan*, 3 M. & W. 247, 248; *Martin v. Great Northern R. R.*, 30 E. L. & E. 473; *Scott v. Dublin & Wicklow Railway*, 11 Ir. C. L. 377; *Dowell v. General Steam Navigation Co.*, 5 El. & Bl. 195; *Bridge v. Grand Junction Railway*, 3 M. & W. 244. Contrary expressions contained in *Tuff v. Warman*, 5 C. B. (N. S.) 573, [and see 27 L. J. (C. P.) 322, 5 Jur. N. S. (Exch.) 222;] are elaborately discussed and criticised in *Murphy v. Deane*, 101 Mass. 455, 464, in which case Wells, J., says: "It is apparent that the statement taken from *Tuff v. Warman*" [that "mere negligence, or want of ordinary care or caution, will not disentitle the plaintiff to recover, unless it be such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened"], "entirely overlooks the practical application of the rule as a guide in the trial a cause. . . . It not only fails to take into account the well-settled principle that the burden is upon the plaintiff to show due care on his own part, but by its form implies the contrary. We think that the statement will be found to be faulty in substance, as well as in form. . . . There is certainly nothing indicated in this proposition for the plaintiff to establish affirmatively. More than this, if it should appear that the negligence of the defendant was an adequate cause to produce the result, the plaintiff must recover, even though he was himself equally, or even to a greater degree than the defendant, in fault. If the case can be supposed in which both parties were equally in fault, the fault of each being equally proximate, direct, and adequate to produce the result, so that it might have occurred from the conduct of either without the fault of the other, there would be a case of contributory negligence, for the consequences of which neither could recover from the other. But upon the statement quoted . . . neither would be 'disentitled,' and therefore both could recover if both suffered injury, each from the other. Every case in which the proof fails to show, or leaves in doubt, which of two sufficient causes was the actual proximate cause of the injury, is practically such a case. It is manifest from this illustration, that, as a definition of the limit of the right to recover in such cases, the proposition . . . must be logically incorrect. Eliminating negatives from the first branch of the proposition, it is, that a plaintiff may recover in such case, unless the misfortune would not have happened but for his own negligence. This, as we have seen, being stated affirmatively, is too broad, and not correct; although its supplement or negative counterpart is correct, as far as it extends, to wit, that he cannot recover if the misfortune could not have happened but for his own negligence."

¹ *Button v. Hudson River R. R.*, 18 N. Y. 248.

that State is expressed as follows: "The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration."¹ So, "it cannot be held as a universal rule, that the plaintiff must prove affirmatively that he was not guilty of negligence, or that the defendant must prove the contrary, in order to establish a defence."² The Supreme Court of the United States, following the rule of the New York courts upon this subject, says: "It is not correct to say that it is incumbent upon the plaintiff to prove . . . care and caution. The want of . . . care . . . is a defence to be proved by the other side. The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of contributory negligence, the defendant must prove them and thus defeat the action. Irrespective of statute law on the subject, the burden of proof upon that subject does not rest upon the plaintiff."³ The rule thus expressed has been adopted in many States. It is said in Pennsylvania: "The natural instinct which leads men, in their sober senses, to avoid injury and preserve life is an element of evidence;"⁴ and in California:⁵ "The gravamen of the action is the negligence of the

¹ *Oldfield v. New York & Harlem R. R.*, 14 N. Y. 310. So it is said that travellers approaching a railway crossing "have . . . greatest incentive to caution, . . . and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case." Per Bradley J., in *Continental Improvement Co. v. Stead*, 95 U. S. 161.

² *Johnson v. Hudson River R. R.*, 20 N. Y. 65; *Wilds v. Hudson River R. R.*, 24 N. Y. 430; but see *Eades v. Clark*, 55 N. Y. S. C. 132.

³ *Washington & Georgetown R. R. v. Gladmon*, 82 U. S. 401, and see *Continental Improvement Co. v. Stead*, 95 U. S. 161; *Hough v. Texas & Pacific R. R.*, 100 U. S. 213; *Crane Elevator Co. v. Lippert*, 24 U. S. App. 176; *Hayes v. North Pac. R. R.*, 46 U. S. App. 41; *Mobile & Ohio R. R. v. Wilson*, 46 U. S. App. 214.

⁴ *Allen v. Willard*, 59 Penn. St. 374; and see *Pennsylvania Tel. Co. v. Varnau*, 15 Atl. Rep. 624 (Penn. 1888).

⁵ *Gay v. Winter*, 34 Cal. 153; *South Toledo, P. & W. R. R. v. Chisholm*, 49 U. S. App. 700. See also *Tolson v. Inland & S. Coasting Co.*,

defendant, but when this is affirmatively shown, and there is no proof of the conduct of the injured person, the jury may infer ordinary care and diligence on his part, taking into consideration his character and habits as proved, and the natural instinct of self-preservation." Thus the doctrine stated would seem to rest upon the assumption that there is, in all cases, a presumption, or inference of fact, derived from the observation

6 Mackey, 39; *Gordon v. Richmond*, 83 Va. 436; *Central R. R. v. Small*, 80 Ga. 519; *Johnston v. Rich. & D. R. R.*, 95 Ga. 685; *Meyer v. King*, 72 Miss. 1; *Jones v. Malvern Lumber Co.*, 58 Ark. 125; *Northern Pacific R. R. v. O'Brien*, 21 Pac. Rep. 32 (Wash. 1889); *Missouri Pacific R. R. v. McCally*, 41 Kan. 639; *St. Louis & S. F. R. R. v. Weaver*, 41 Kan. 639; *Ford v. Umatilla County*, 15 Or. 313; *O'Brien v. Tatum*, 84 Ala. 186; *Kansas City, M. & B. R. R. v. Crocker*, 95 Ala. 412; *Western R. R. v. Williamson*, 114 Ala. 131; *Kimball v. Friend*, 95 Va. 125; *Southern R. R. v. Bryant*, 95 Va. 212; *Canfield v. Asheville St. Railway*, 111 N. C. 597; *Whaley v. Bartlett*, 42 S. C. 454; *Ewen v. Chicago & Northwestern R. R.*, 38 Wis. 613; *Hoyt v. Hudson*, 41 Wis. 105; *Strong v. Stevens Point*, 62 Wis. 255; *Greenleaf v. Illinois Central R. R.*, 29 Iowa, 14; *Stewart v. Nashville*, 96 Tenn. 50. In the following cases it is held that contributory negligence is an affirmative defence, and as such is to be specially pleaded. *Reeves v. Dubuque & Sioux City R. R.*, 92 Iowa, 32; *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57; *Keitel v. St. Louis Cable & W. R. R.*, 28 Mo. App. 657; *St. Clair v. Missouri Pacific R. R.*, 29 Mo. App. 76; *Donovan v. Hannibal & St. Jo. R. R.*, 89 Mo. 147; *Thorpe v. Missouri Pacific R. R.*, 89 Mo. 650; *Hill v. Meyer Bros. Drug Co.*, 140 Mo. 433; *Louisville & Nashville R. R. v. Copas*, 95 Ky. 460; *Louisville & Nashville R. R. v. Schuster*, 7 S. W. Rep. 874 (Ky. 1888), and the later cases in Texas hold the same rule. See *Ball v. El Paso*, 5 Tex. Civ. App. 221; *Gulf, C. & Santa Fe R. R. v. Finley*, 11 Tex. Civ. App. 64; *Sickles v. Mo., K. & T. R. R.*, 13 Tex. Civ. App. 434. The same rule is held in Nebraska, *Union Stock Yards Co. v. Conoyer*, 41 Neb. 617, and so when the issue is between master and servant, *Kearney El. Co. v. Laughlin*, 45 Neb. 391; *Lincoln Street R. R. v. Cox*, 48 Neb. 807. It is held in Missouri, that a general averment of contributory negligence in an answer, without specifying the particular act of negligence relied on, is sufficient to establish the defence, *Neier v. Missouri Pacific R. R.*, 6 S. W. Rep. 695 (1890); and where the plaintiff's own testimony shows that he was guilty of such contributory negligence as to defeat his right of action, the defendant may take advantage of it, although he has not pleaded specially. *Hudson v. Wabash W. R. R.*, 101 Mo. 23; and see *North Birmingham Street Railroad v. Calderwood*, 7 So. Rep. 360 (Ala. 1890); *Hobson v. New Mexico & A. R. R.*, 11 Pac. Rep. 545 (Ariz. 1890); *Murray v. Missouri Pacific R. R.*, 101 Mo. 136.

of the ordinary conduct of men in circumstances of danger, that the person in such a situation will exercise a reasonable care for his own safety; and that this presumption, or inference, may ordinarily stand in the place of positive proof, so as to support the burden of proof which, in ordinary cases, is to be overcome by direct affirmative testimony.¹ In accord with this theory of the law as to burden of proof, appear to be the expressions of Denio, J., in the leading case in New York upon the subject: "I am of opinion that it is not a rule of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* . . . depends upon the position of the affair as it stands upon undisputed facts. Thus, if a carriage be driven furiously upon a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover though there were no witnesses of his actual conduct. The natural instinct of preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required. But if one make an excavation or lay an obstruction in the highway, which may or may not be the occasion of an accident to a traveller, it would be reasonable to require a party seeking damages for an injury to give general evidence that he was travelling with ordinary moderation and care."² The principle thus stated has repeatedly been applied by the Federal courts. Thus it was held that the law, in the entire absence of evidence, presumes that a railway employee, crossing the track of a railway at night, on foot, to go to his duty, looks and listens for approaching

¹ So it is held that although the burden of proof is upon the proponent of a will, yet the presumption that the testator was sane is effectual as proof, in the absence of any controverting testimony, to overcome the presumption against the validity of the will. See Buswell, Law of Insanity, § 177.

² *Johnson v. Hudson River R. R.*, 20 N. Y. 65, 69. Where the plaintiff slipped on an icy ridge and was injured, and there was no evidence whatever to show any care by the plaintiff, it was held that she was not entitled to recover. *Weston v. Troy*, 139 N. Y. 281.

trains, before crossing;¹ and that the presumption is that a traveller, seeing a railway train approaching a crossing, will not attempt to cross in front of it.² And where it did not appear whether one killed by a railway train in attempting to make a crossing looked and listened as he approached the crossing, it was held that the question of his contributory negligence was for the jury;³ and it has been laid down as a general rule that where there were no eye-witnesses of an accident the question of the negligence of a person injured thereby is one of fact.⁴ Although the burden be on the defendant to show contributory negligence, proof of this may well arise out of the plaintiff's testimony.⁵

§ 137. **Application of the Conflicting Rules.** — In cases in which there is conflicting testimony upon the question of contributory negligence, or when the uncontroverted testimony leaves the question in doubt, it will be of little consequence which rule as to burden of proof is applied, since, by an application of either, it will become the duty of the jury to ascertain the preponderance of the testimony, or its effect, and render their verdict accordingly. And it is to be observed that mere presumptions of fact become of little weight, when the positive facts of the case are in evidence. Thus it was held, where, in an action for personal injuries, the plaintiff was a witness in her own behalf, that inferences as to the absence of contributory negligence, arising from the instinct of self-preservation, were not to be entertained.⁶ But when there is not any positive testimony in the case upon the point of contributory negligence, different results may be reached according as the

¹ *Texas & Pacific R. R. v. Gentry*, 163 U. S. 353.

² *McGhee v. Kennedy*, 31 U. S. App. 366.

³ *Northern Pacific R. R. v. Freeman*, 48 U. S. App. 757.

⁴ *Toledo, P. & W. R. R. v. Chisholm*, 49 U. S. App. 700.

⁵ *Waterman v. Chicago & N. W. R. R.*, 82 Wis. 613. See § 137, *post*, and cases cited.

⁶ *Reynolds v. Keokuk*, 72 Iowa, 371. So, although it is held generally, in New York, that the presumption of due care is to prevail in doubtful cases, yet where all the circumstances in evidence pointed just as much to the negligence of the injured person as to the absence of it, or pointed in neither direction, it was held that the plaintiff should be non-suited. *Cordell v. New York Central & H. R. R. R.*, 75 N. Y. 330.

courts do, or do not, admit the existence and weight of the presumption. Thus, in Massachusetts, it is held that if the evidence be equally consistent either with care or negligence on the part of the plaintiff he fails to sustain the burden of proof and so cannot recover. So where one was fatally injured by driving into a ditch in a city, and died without having testified as to the circumstances of the accident, and the only testimony as to the circumstances was that of a person who did not see the accident, but helped to pick up and remove the injured person, it was held that there could be no recovery.¹ And a like rule was held by the majority of the court, in a case where the plaintiff's intestate was killed at the crossing of a railway, and the only material testimony was that he was struck by a detached car of the defendant which was moving rapidly without signal or warning.² On

¹ *Crafts v. Boston*, 109 Mass. 519. But, in some cases, circumstances, without the production of eye witnesses, may establish the fact that the plaintiff was in the exercise of due care. *Lazelle v. Newfane*, 69 Vt. 306.

² *Hinckley v. Cape Cod R. R.*, 120 Mass. 258. In this case, while admitting the general rule as laid down in Massachusetts, Gray, C. J., and Morton, J., dissented from the majority of the court, on the ground that sufficient testimony was disclosed to send the question of contributory negligence to the jury as one of fact. The majority opinion distinguishes the cases of *French v. Taunton Branch R. R.*, 116 Mass. 537, and *Craig v. New York & New Haven R. R.*, 118 Mass. 431. The case illustrates the difficulty of applying the general rule laid down, since, in deciding the legal question whether in any case there is evidence to go to the jury upon the issue of contributory negligence, the court has to weigh and determine the effect of the facts in the case. In *Maguire v. Fitchburg R. R.*, 146 Mass. 379, the evidence of due care on the part of the plaintiff was very slight, but the case was distinguished from *Hinckley v. Cape Cod R. R.*, *supra*, and the question left to the jury. See also, *Thyng v. Fitchburg R. R.*, 156 Mass. 13; *Tyndale v. Old Colony R. R.*, 156 Mass. 503; *Barton v. Kirk*, 157 Mass. 303; *Tyler v. Old Colony R. R.*, 157 Mass. 336; *Moore v. Boston & Albany R. R.*, 159 Mass. 399; *Geyette v. Fitchburg R. R.*, 162 Mass. 549; *Dyer v. Fitchburg R. R.*, 170 Mass. 148; *Stewart v. N. Y., N. H. & H. R. R.*, 170 Mass. 430. Where one was found fatally injured at the bottom of a mining-shaft, and there was no competent evidence as to the cause of his falling, it was held that there was a total failure of proof of facts to charge the owner of the mine with responsibility for the accident. *Lendberg v. Brotherton Iron Mining Co.*, 75 Mich. 84. See, also, *Baltimore & Ohio R. R. v. State*, 71 Md. 590; *Par-*

the other hand, in a very similar case occurring in New York, the court being asked to rule that there was no affirmative testimony to show that the injured person looked to see where he was going as he approached the crossing, this ruling was refused, and the court said that the presumption that the injured person would look out for his own safety might well control the case, and left the question of contributory negligence to the jury.¹ Where the plaintiff's intestate, an experienced brakeman, when last seen alive was performing his duty in setting the brakes on a car on which he was riding, and a minute later, the train having separated at the first coupling in front of him, he was thrown to the ground, run over, and killed, and there was no other evidence bearing on the question of his negligence, it was held that the question was for the jury.² Where an engineer was killed at his post by accident resulting from the presence of ice across the track which he must have been unable to see by reason of a fog, it was held that he might be considered to have been in the exercise of due care.³ Where one driving a wagon, on a dark night, on a highway thirty-two feet wide, apparently backed the wagon across the highway, through a line of trees over a sidewalk and down a slope into a pond, between which and the highway there was no barrier except the row of trees, and he was found drowned in the pond, and no other circumstances of the accident appeared, it was held that it did not appear as matter of law that the deceased had been guilty of contributory negligence.⁴

§ 138. **Question generally one of Fact.** — Whatever rule be adopted as to burden of proof in cases involving the question of contributory negligence, the court will not, when the evidence upon this issue is contradictory, or when the conclusions

rott v. Wells, 15 Wall. 524, 537; *Norwood v. Raleigh & G. R. R.*, 111. N. C. 236.

¹ *Massoth v. Delaware & Hudson Canal Co.*, 64 N. Y. 524. See, also, *Atkinson v. Abraham*, 45 Hun, 238; *Galvin v. New York*, 112 N. Y. 223; *Bond v. Smith*, 113 N. Y. 378.

² *Burns v. Chicago, Milwaukee & St. P. R. R.*, 69 Iowa, 450.

³ *Scagel v. Chic. M. & St. P. R. R.*, 83 Iowa, 380.

⁴ *Lutton v. Vernon*, 62 Conn. 1.

to be drawn from it are doubtful, decide the question as one of law, although the evidence may seem to preponderate on one side or the other. To do this would, in many cases, be to determine both the weight and the credibility of the testimony. Moreover the surrounding circumstances of each case, and the conduct of the plaintiff in reference to them, will, generally, afford plausible grounds for such a variety of inferences as to make the verdict of a jury the only proper means to determine the essential facts. So, however indicative of carelessness on the part of the plaintiff the circumstances may seem to the court, if there be any substantial testimony in the case upon which it would be competent for the jury to find that the plaintiff was not guilty of contributory negligence, the question is to be submitted to them as being a question of fact.¹ On the other hand, a scintilla of evidence is not enough to authorize the court to submit the question to the jury.² There must be something to justify a reasonable inference that the plaintiff was, at the time of the injury, in the exercise of due care,³ and when, upon the uncontroverted facts, contributory negligence clearly appears, it is to be so found as matter of law.⁴

§ 139. **Necessity of Proof removed by Statute: Passenger.** —

The necessity of proving that the injured person was in the exercise of due care has been removed by statute in certain

¹ *Mayo v. Boston & Maine R. R.*, 104 Mass. 337; *Germond v. Cent. Vt. R. R.*, 65 Vt. 126; *Manley v. D. & H. Canal Co.*, 69 Vt. 101; *Chisholm v. State*, 141 N. Y. 246; *McNown v. Wabash R. R.*, 55 Mo. App. 585; *Claybaugh v. Kansas City, &c. R. R.*, 56 Mo. App. 630; *McCormick v. Monroe*, 64 Mo. App. 197; *Romeo v. Boston & Maine R. R.*, 87 Maine, 540.

* *Mayo v. Boston & Maine R. R.*, 104 Mass. 137, and see §§ 93, 94, *ante*.

² *Butterfield v. Western R. R.*, 10 Allen, 532; *Denny v. Williams*, 5 Allen, 1. See, also, *Philadelphia & R. R. R. v. Hummell*, 44 Penn. St. 375; *Wilds v. Hudson River R. R.*, 24 N. Y. 430.

⁴ *Gates v. Penn. R. R.*, 154 Penn. St., 566; *Vannata v. Cent. R. R. of N. J.*, 154 Penn. St. 262; *Whitman v. Penn. R. R.*, 156 Penn. St. 175; *Russell v. Carolina Cent. R. R.*, 119 N. C. 1098; *Louisville & N. R. R. v. Phillips*, 100 Ala. 365; *Grows v. Maine Central R. R.*, 67 Maine, 100; *Smith v. O. & O. Steamship Co.*, 99 Cal. 462.

cases, notably where the injured person is a passenger for hire upon a railway train. Thus the General Statutes of Massachusetts, c. 63, §§ 97, 98,¹ provided that "if by reason of the negligence or carelessness of a railroad corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being a passenger is lost; or the life of any person being in the exercise of due diligence, and not being a passenger or in the employment of such corporation, is lost; in either case the corporation" shall be subject to indictment and fine. This provision embodies the substance of several preceding statutes upon the same subject, and the court, in considering it, say: "In comparing these different statutes, we are led to the conclusion that the legislature designed to subject the defendant to the penalty for causing the death of a passenger, though such passenger might have been wanting in the exercise of due care. We cannot suppose that . . . the omission to require due care from a passenger, and the express requirement of it from other persons, is without meaning, and that due care is required in both cases."² And, as to the provision in the same statute, for a civil action of tort in behalf of the personal representatives of a passenger killed by the fault of a railway corporation,³ it is held that the latter provision, equally with the former, dispenses with the necessity of proof of due care on the part of the injured person.⁴ So where the

¹ Pub. Sts. c. 112, § 212. The benefit of the act is extended to employees. Acts 1883, c. 243. See §§ 21 *et seq.*, *ante*, notes and cases cited.

² *Commonwealth v. Boston & Lowell R. R.*, 134 Mass. 211.

³ Pub. Sts. c. 112, § 212.

⁴ *Merrill v. Eastern R. R.*, 139 Mass. 252; *McKimble v. Boston & Maine R. R.*, 139 Mass. 542. The statute in Maine, expressly provides that the deceased, though a passenger, must, in order to a conviction, have been in the exercise of due care. A similar statute, in New Hampshire, Gen. Sts. c. 264, § 14, makes no distinction between passengers and other persons not in the employment of the defendant company, and does not in terms require due care on the part of the injured person. But the proceeding under this statute, although in the name of the State, is held to be essentially a civil proceeding to recover damages, and to be governed, so far as may be, by the rules governing civil actions. *State v. Manchester & Lawrence R. R.*, 52 N. H. 528. Where one leaves a train in

statute provides that in every case of non-observance by a railroad company of certain precautions to prevent accident the company shall be liable for the damages caused thereby, the fact that the injured person was not in the exercise of due care will not prevent his recovering although it may, perhaps, be admissible in mitigation of damages.¹

§ 139 a. **Effect of Such Statutes in the Federal Courts.** — The question whether the Federal courts will follow the courts of a State, as to the effect of contributory negligence in actions under a statute of the State, depends upon the grounds given by the State court as the basis of its conclusion. If the statute is held to be merely declaratory of the common law,

motion he thereby ceases to be a passenger, and in order to recover for an injury received after he has left the train, he must show that he was in the exercise of due care. *Commonwealth v. Boston & Maine Railroad*, 129 Mass. 500; *Buckley v. Old Colony R. R.*, 161 Mass. 26. So where the plaintiff left a train which had stopped at a short distance from a station at a place where it was not customary to leave passengers. The rule may be otherwise when plaintiff supposes the train has arrived at the station. *Bass v. Providence & Worcester R. R.*, 15 R. I. 149.

¹ *Railway Companies v. Foster*, 88 Tenn. 671. See also *Mobile & Ohio R. R. v. People*, 24 Ill. App. 250. The Gen. Sts. South Carolina, § 1529, provide that the plaintiff shall not recover when the injury was caused by the defendant's negligence, if the plaintiff was guilty of "gross or wilful negligence" which contributed to the injury. See *Petrie v. Columbia & G. R. R.*, 29 S. C. 303. Section 2972 of the code of Georgia making the defendant liable, although the plaintiff may have contributed to the injury, if the plaintiff could not, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, is not applicable when the plaintiff claims full damages, and not as in the case of contributory negligence. *Pierce v. Atlanta Cotton Mills*, 79 Ga. 782. Under a statute in Illinois providing for fencing the openings to coal shafts, it was held that the defendant was liable for his failure to do this, irrespective of the question of the contributory negligence of the plaintiff's testator. *Catlett v. Young*, 143 Ill. 74. For statutory or constitutional provisions modifying the common-law rule of contributory negligence in favor of employees, see Const., Miss., 1890, sec. 193; *Short v. New Orleans & N. E. R. R.*, 69 Miss. 848; *Welsh v. Alabama & Vicksburg R. R.*, 70 Miss. 20; *Buckner v. Richmond & D. R. R.*, 72 Miss. 873; Comp. Sts. Nebraska, c. 72, art. 1, sec. 3; *Missouri Pacific R. R. v. Baier*, 37 Neb. 253; *Chicago, B. & Q. R. R. v. Hague*, 48 Neb. 97; *Fremont, E. & M. V. R. R. v. French*, 48 Neb. 638.

both in its requirements and in the measure of liability to be imposed for failure to observe it, and the plea of contributory negligence is allowed only in mitigation of damages, because, in the view of the court, that is the only effect the statute could have in an action for common-law negligence; the effect of contributory negligence in such a case will be considered a question of general common law, in which the Federal courts may exercise an independent judgment. But when the rule of the State court is the legitimate effect of the construction, by the supreme tribunal of the State, of a State statute, then the Federal courts will follow such construction.¹ Thus a rule that contributory negligence shall not be a complete bar to a statutory action for negligence, but only go to mitigation of damages,² is binding upon a Federal court when such rule grows out of the language of the statute and its construction by the Supreme Court of the State.³ So, in the absence of legislative enactments, the liability of the master to one of his employees for the negligence of another is to be determined by the general and not by the local law; and the decisions of the courts of the State in which the injury is inflicted are not controlling in the Federal courts; but when the subject is regulated by the statutes of the State in which the injury is inflicted, these become the "rules of decision in trials at common law" in the Federal courts, under U. S. Rév. Sts. § 721.⁴

SECTION II.

GENERAL RULES APPLIED TO THE ISSUE.

§ 140. **Unlawful Act of Plaintiff contributing.**—If the plaintiff at the time of the occurrence of the injury complained of

¹ *Nason v. Kansas City, &c. R. R.*, 22 U. S. App. 220.

² *Code, Tenn. Mill. & V.* (1884), §§ 1298-1300. See *Western & Atlantic R. R. v. Roberson*, 22 U. S. App. 187, following *Louisville & Nashville R. R. v. Burke*, 6 Cold. 45; *Railroad v. Acuff*, 92 Tenn. 26.

³ *Byrne v. Kansas City, &c. R. R.*, 9 C. C. A. 666.

⁴ *Northern Pacific R. R. v. Mase*, 27 U. S. App. 238. See *Peirce v. Van Dusen*, 47 U. S. App. 339, as cited post, § 218.

is engaged in the doing of an unlawful act, which act may fairly be referred to as being the proximate cause of the injury, he cannot recover for such injury.¹ A familiar illustration of this rule is afforded in the case of a trespasser, it being commonly held that one unlawfully upon the land of another cannot recover for injuries there received by him, unless such injuries were wanton or malicious on the part of the owner of the land, or the result of negligence so extreme on the part of the owner that wanton or malicious intent is to be inferred therefrom.² The question in every case must be whether the unlawful act was the direct and efficient cause of the injury, and upon this question it is said: "The best minds often differ upon the question whether in a given case illegal conduct of a plaintiff was a direct and proximate cause contributing with others to his injury, or was a mere condition of it; or, to state the question in another way, appropriate to the reason of the rule, whether or not his own illegal act is an essential element of his case as disclosed upon all the evidence. Upon this point it is not easy to reconcile the cases. . . . But whatever criticisms may have been made upon the decisions or the assumptions in certain cases, — that illegal action of the plaintiff

¹ *Baker v. Portland*, 58 Maine, 199; *Norris v. Litchfield*, 35 N. H. 271; *Sutton v. Wauwatosa*, 29 Wis. 21; *Davis v. Guarnieri*, 45 Ohio St. 470; *Tuttle v. Lawrence*, 119 Mass. 276; *Lyons v. Desotelle*, 124 Mass. 387; *Smith v. Boston & Maine R. R.*, 120 Mass. 490; *Heland v. Lowell*, 3 Allen, 407; *Hall v. Corcoran*, 107 Mass. 251. In the latter case it is held that, in the former case of *Gregg v. Wyman*, 4 Cush. 322, the court erred in holding the plaintiff's illegal conduct to be an essential element of his case, when, in fact, it was merely incidental to it. It was held, where one was detected in breaking open a railroad car in the night-time, and, when discovered, jumped out and ran, and refused to stop when halted, and was thereupon shot by an employee of the train, that the criminal's joint and contributory fault would bar his recovery in a civil action for damages against the railroad company. *Candiff v. Louisville, N. O., & T. R. R.*, 42 La. Ann. 477.

² See § 71, *ante*. So, where the servant of a telegraph company engaged in stringing wires along a highway, the company not having a license to string wires, was injured by the driving of a street car against a wire attached to his person, it was held that he could not recover against the railway company for his injury, it not appearing that there was malice on the part of the servants of the company. *Banks v. Highland Street Railway*, 136 Mass. 485.

contributed to the result, or was to be treated as a concurring cause, or upon language in disregard of the distinction between a cause and a condition,—there has been none upon the doctrine that, when a plaintiff's illegal conduct does directly contribute to his injury, it is fatal to his recovery of damages.”¹

§ 141. **Violation of Statute or Ordinance.**—The general rule stated applies when the illegal act of the plaintiff consists in the violation of a general law or municipal ordinance. In such cases, the proof of the illegal act merely renders it incumbent on the plaintiff to show that such violation was not the proximate cause of the injury complained of.² Thus, it is held generally that the fact that a plaintiff, at the time of the accident, was in the act of violating a municipal ordinance against fast driving will not preclude him from recovering damages, as against one whose negligence was the proximate cause of the injury, unless such driving in fact contributed to the injurious result.³ It is obvious that those cases do not fall within this rule, in which, by the express terms of the statute or ordinance, it is provided that the party violating it shall not have his remedy if, while engaged in such violation, he is injured.⁴ It is held, generally, that

¹ Per Knowlton, J., in *Newcomb v. Boston Protective Department*, 146 Mass. 596, 602. See *Reed v. Missouri Pacific R. R.*, 50 Mo. App. 504.

² *Minerly v. Union Ferry Co.*, 56 Hun, 113; *Illinois Central R. R. v. Ashline*, 171 Ill. 313; *Young v. Chic., M. & St. P. R. R.*, 100 Iowa, 357. Where a city ordinance provided that no person should play in its streets so as to interfere with their use by travellers, it was held that such ordinance would not affect a child twenty-one months old nor modify the duty of others to use due care towards such a child alone in the street. *Budd v. Meriden El. R. R.*, 69 Conn. 272.

³ *Wright v. Malden & Melrose R. R.*, 4 Allen, 283; *Hall v. Ripley*, 119 Mass. 135; *Hanlon v. South Boston R. R.*, 129 Mass. 310; *Jetter v. New York Central & H. R. R. R.*, 2 Abb. App. Cas. 458.

⁴ *Corry v. Bath*, 35 N. H. 530; *Carroll v. Staten Island R. R.*, 58 N. Y. 126; *Mohney v. Cook*, 26 Penn. St. 342, and see *Sutton v. Wauwatosa*, 21 Wis. 21. So there are certain penal, or *quasi* penal, statutes which make the violator of them responsible for such violation absolutely, and do not regard the question whether or not he was guilty of actual negligence. See *Newcomb v. Boston Protective Department*, 146

proof of the existence of the statute is always competent evidence upon the issue of the plaintiff's negligence; but its materiality depends upon whether its violation contributed directly to the injury.¹ It is to be observed that a different rule may obtain where the thing unlawfully done is in itself wrongful, — that is, not merely *malum prohibitum*, but *malum in se*. It is said: "There are, no doubt, cases where-

Mass. 596, 600. The cases, in Massachusetts, in which plaintiffs have been held precluded from a recovery for injuries received while travelling on the Lord's Day, in violation of the statute prohibiting such travelling unless for reasons of necessity or charity, seem to have rested upon the assumption that the violation was in all cases, *ex necessitate*, the proximate cause of the injury. *Stanton v. Metropolitan R. R.*, 14 Allen, 485, and see also, *Smith v. Boston & Maine R. R.*, 120 Mass. 490; *Davis v. Somerville*, 128 Mass. 594; *Day v. Highland Street R. R.*, 135 Mass. 113. So, in the latter case, it was said: "This is not because the liability of a city or town for a defect in a way is imposed by statute, or because a city or town stands in any different position from an individual, or other corporation, but only because the act of travelling, which is the act prohibited, necessarily contributes to cause the injury. The act . . . with no evidence of any other negligence has been held to be necessarily contributory to the injury sustained by the plaintiff." The same rule has been applied in the same State in actions brought for injuries received by a defendant while engaged in laboring on the Lord's Day, in violation of the statute. See *McGrath v. Merwin*, 112 Mass. 467; *Read v. Boston & Albany R. R.*, 140 Mass. 119. So far as these cases hold that the violation of the statute is to be conclusively presumed to be the proximate cause of the injury, it would seem that they are not in accord with the weight of authority, and it is perhaps difficult to reconcile them with the cases in the same State, in which it has been held that the fact that a plaintiff was violating an ordinance against fast driving when he was injured would not necessarily preclude him from maintaining an action for his injury. See cases cited *supra*. The later case of *Newcomb v. Boston Protective Department*, 146 Mass. 596, would seem to establish, in Massachusetts, the general rules upon this subject which are held elsewhere. (Now, in Massachusetts, it is provided that "the provisions of c. 98 of the Public Statutes relating to the observance of the Lord's Day, shall not constitute a defence to an action for a tort or injury suffered by a person on that day." St. 1884, c. 37, § 1.)

¹ See cases cited *supra*, and *Damon v. Scituate*, 119 Mass. 66. It is said, apparently with reason, that the existence of the statute is immaterial, unless there be evidence that the plaintiff has violated it. *Fernbach v. Waterloo*, 34 N. W. Rep. 610 (Iowa, 1887); but see, *Dundas v. Lansing*, 75 Mich. 499.

in an injured party will be remediless, even when his fault does not contribute to the accident. A vessel engaged in the slave-trade, piracy, or smuggling, and injured by another, or the keeper of a gambling-house injured in his business by a neighboring nuisance, could have no remedy. Not, however, because the persons are out of the protection of the law for their offences, nor because their illegal business brought them to the place of danger; but because their business itself, with all its instruments, is outlawed. Prohibited contracts, prohibited trades, and prohibited things receive no legal protection; but persons are never outlawed." So the court held that one who erected an obstruction in a navigable stream, and thereby caused injury to another, could not, as a defence to an action for the injury, set up that the plaintiff was unlawfully engaged in worldly employment on Sunday when the injury occurred; and said, "We cannot see that Sabbath-breaking is a fault of this description. If there is any . . . connection between such a fault and the event here complained of, then it falls under the rule, *causa proxima non remota spectatur*." ¹

§ 142. **Utmost Care not required.** — The behavior of the plaintiff must be adapted to the circumstances in which he is placed; but it is not necessary that he should have behaved with perfect composure and entire self-possession, or should have come to an accurate decision as to the wisest course to pursue.² The law, having consideration for the weakness of human nature, will not require of a person placed in circumstances of sudden danger, confusion, or excitement, that deliberate forethought to be expected under other circumstances.³

¹ Per Lowrie, J., in *Mohney v. Cook*, 26 Penn. St. 342, 349, 350. See also *Philadelphia, Wilmington & B. R. R. v. Havre de Grace Steam Tow-boat Co.*, 23 How. 209; *Powhatan Steamboat Co. v. Appomattox R. R.*, 24 How. 256.

² *Fero v. Buffalo & State Line R. R.*, 22 N. Y. 209; *Ernst v. Hudson River R. R.*, 24 How. Pr. 97. Thus, if a child goes upon a railroad track in order to escape from cattle of which she is afraid, this is not a matter of law contributory negligence. *Cassida v. Oregon Railway & Nav. Co.*, 14 Or. 551.

³ *Cook v. New York Central R. R.*, 3 Keyes, 476; *McGrath v. Hudson*

So a person, in the attempt to rescue another from danger, may assume some risk short of mere rashness, without being legally chargeable with a want of due care.¹ It is said: "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons."² It is not negligence *per se* for one voluntarily to risk his own safety or life in attempting to rescue another from peril; and the question whether he is to be charged with contributory negligence is for the jury under proper instructions.³ If the act of the defendant has caused fear and loss of presence of mind on the part of the plaintiff, so as to impel him to rush into danger and thereby to suffer injury, the plaintiff is not to be charged with contributory negligence.⁴ The age and mental and bodily capacity are to

River R. R., 32 Barb. 144; 19 How. Pr. 211; *Willis v. Long Island R. R.*, 32 Barb. 398; *Wilds v. Hudson River R. R.*, 3 Barb. 503; *Barker v. Savage*, 1 Sweeney (N. Y.), 288; *Ladd v. Foster*, 31 Fed. Rep. 827; *Pennsylvania Tel. Co. v. Varnau*, 15 Atl. Rep. 624 (Penn. 1888); *South Covington, &c. Street Railway v. Ware*, 84 Ky. 267; *Sekarak v. Jutt*, 153 Penn. St. 117; *Gray v. Germania, &c. Co.*, 164 Penn. St. 508; *Donahue v. Kelly*, 181 Penn. St. 93; *Railroad v. Pugh*, 97 Tenn. 624; *Haas v. Chic. M. & St. P. R. R.*, 90 Iowa, 259; *Penn. Co. v. McCaffrey*, 139 Ind. 430; *Durham, &c. Co. v. Dandelin*, 143 Ill. 409; *Peoria, D. & E. R. R. v. Rice*, 144 Ill. 227; *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332; *Gulf, Col. & Santa Fe R. R. v. Knott*, 14 Tex. App. 158; *Chic. & N. W. R. R. v. Tripkosh*, 32 U. S. App. 406.

¹ *Buel v. New York Central R. R.*, 31 N. Y. 314; *Pigott v. Lilly*, 55 Mich. 150; *Donahoe v. Wabash, St. L. & Pac. R. R.*, 83 Mo. 550; *Carroll v. Minnesota Valley R. R.*, 14 Minn. 57.

² *Eckert v. Long Island R. R.*, 43 N. Y. 502. In this case, the plaintiff was injured in the attempt to rescue a child from being run over by the defendant's locomotive, and it was held that he was not to be debarred from a recovery on the ground of contributory negligence. See *Linnehan v. Sampson*, 126 Mass. 506; *Spooner v. Delaware, L. & W. R. R.*, 115 N. Y. 22.

³ *Pennsylvania R. R. v. Langdon*, 48 Ohio St. 316; *Floyd v. Phil. & R. R.*, 162 Penn. St. 29, and see *Brown v. French*, 104 Penn. St. 604.

⁴ *Coulter v. American Express Co.*, 56 N. Y. 585. In this case the defendant's servant was recklessly driving an express wagon upon a sidewalk in a city, and the plaintiff, in order to escape the sudden danger of collision, sprang to one side, and, in so doing, struck her head against a

be considered in determining the question of his contributory negligence;¹ and whether his fright and confusion of mind was such as reasonably to excuse an act ordinarily imprudent, is generally a question to be determined by the jury.² It has been held that under some circumstances the sex of the plaintiff is to be taken into account in determining the measure of care to be exacted of her;³ and a less measure of care is to be exacted from infants than from adults.⁴ By an application of the rules stated, it is held that the failure, on the part of a person approaching a railway crossing, to look out for a train, may be excusable under circumstances of great confusion and excitement of mind; as where such person has his attention directed to one of two approaching trains, and in seeking to avoid it, he fails to look out for the other.⁵ Again, a person may, in the line of his duty, do acts which in a stranger or intruder would be clearly negligent, but which will not estop him from a recovery for an injury received through the fault of his employer; as where an employee of a railroad, in the performance of his prescribed work, stepped upon the track, in front of an approaching train, which he had reason to believe would be stopped before it reached him, and building, and was thereby injured; and it was held that she was not as matter of law guilty of contributory negligence.

¹ *Filer v. New York Central R. R.*, 49 N. Y. 47; *Neff v. Wellesley*, 148 Mass. 487; *Simms v. South Carolina R. R.*, 26 S. C. 490; *International & G. N. R. R. v. Garcia*, 75 Tex. 383; *Kennedy v. Denver, St. P. & P. R. R.*, 10 Colo. 493, and see §§ 146, 147, *post*, notes and cases cited.

² *Johnson v. West Chester & Philadelphia R. R.*, 70 Penn. St. 357; *Galena, &c. R. R. v. Yarwood*, 17 Ill. 509. A person who is compelled to act at once, in the presence of imminent danger, is not, as matter of law, to be held guilty of contributory negligence, merely because of his failure to choose the best means of escape therefrom. *Schultz v. Chicago & Northwestern Railway*, 44 Wis. 638; *Chicago, Rock Island & Pacific Railroad v. Dignan*, 56 Ill. 487.

³ Thus it is said that a woman driving a horse on the highway may be presumed to be somewhat wanting in the "knowledge, skill, dexterity, steadiness of nerve, and coolness of judgment" which are to be looked for in a man under like circumstances. *Hassenyer v. Michigan Central R. R.*, 48 Mich. 204. See *Snow v. Provincetown*, 120 Mass. 580; *Bloomington v. Perdue*, 99 Ill. 329.

⁴ See § 148, *post*.

⁵ *Schultz v. Chic. & N. W. R. R.*, 44 Wis. 638.

was struck by it and injured.¹ The rule was held otherwise where the employee was not upon the track in the line of his duty and had no reason to suppose that he could enter upon the track without danger.² Where the employee of a railway company engaged in running a hand-car was put in sudden apprehension of a collision with an approaching locomotive, the question whether he was guilty of contributory negligence in leaping from the hand-car in order to avoid the collision is for the jury.³ Where it appeared that the injured person was walking on a portion of the defendant's track, built over low marshy ground, on each side of which there was a ditch filled with water; that there was no way of getting off the track except by jumping into or across the ditch; that when the deceased first saw the locomotive it was about nine hundred and twenty feet behind him, and he was about one hundred and fifty feet from a platform at which he could have left the track; it was held that it was a question for the jury what he should have done to avoid injury and whether he was negligent.⁴

§ 143. **Wilful Assumption of Unnecessary Risk.** — A person who voluntarily exposes himself to obvious danger, without

¹ *Steele v. Central R. R. of Iowa*, 43 Iowa, 109. See also *Farley v. Chicago, R. I. & Pac. R. R.*, 56 Iowa, 337.

² *Murphy v. Chicago, R. I. & Pac. R. R.*, 38 Iowa, 539, 45 Iowa, 661.

³ *Smith v. Wrightsville & T. R. R.*, 83 Ga. 671. But a section man remaining in a hand-car and run down by a train, when he, clearly, might have saved himself by jumping, is guilty of contributory negligence. *Nelling v. Chic., St. P. & K. C. R. R.*, 98 Iowa, 554.

⁴ *Remer v. Long Island R. R.*, 48 Hun, 352. See also *Neier v. Mo Pacific R. R.*, 6 S. W. Rep. 695 (Mo. 1888). So where the injured person was walking on the track. *May v. Central R. R. & Banking Co.*, 80 Ga. 363. Where a person and his infant son were both trespassers upon the right of way of a railroad, and the son was exposed to consequent peril by the voluntary act of the father, it was held that the personal representative of the father was not entitled to recover for the father's death while attempting to rescue the son; although, had the father not been a trespasser and chargeable with exposing his son to peril, the mere attempt to rescue the son would not have been such negligence on the father's part as to preclude a recovery for an injury caused by the negligence of the railway company. *Cleveland, C. C. & St. L. R. R. v. Phillips*, 24 U. S. App. 489.

any reason of necessity or propriety to justify him in so doing, is, as matter of law, guilty of negligence, and assumes all the risks attending his act.¹ Thus, it may be contributory negligence to enter a railway tunnel, knowing that trains are about to pass through it;² or to walk upon a railroad-track in front of a moving locomotive;³ or to ride upon the "pilot" of a locomotive;⁴ or to enter upon a railway crossing while the gates are down to indicate the approach of a train;⁵ or to dive in rocky and shallow water while bathing;⁶ or to skate on thin ice after proper warning of danger;⁷ or unnecessarily to stand upon the platform of a moving railway-car;⁸ or to get upon,⁹ or to alight from,¹⁰ such a car while it is in motion;

¹ *Schoenfield v. Milwaukee City R. R.*, 74 Wis. 433; *Frazer v. South & North Alabama R. R.*, 81 Ala. 185; *Todd v. Old Colony & Newport R. R.*, 7 Allen, 207; *Murphy v. Webster*, 151 Mass. 121.

² *Loeffler v. Missouri Pacific R. R.*, 96 Mo. 267.

³ *Donnelly v. Brooklyn City R. R.*, 109 N. Y. 16; *Ohio & Mississippi R. R. v. Hill*, 117 Ind. 56.

⁴ *Jones v. Baltimore & Potomac R. R.*, 95 U. S. 439.

⁵ *Granger v. Boston & Albany R. R.*, 146 Mass. 276.

⁶ *Hinz v. Starin*, 3 N. Y. Sup. N. E. Rep. 290 (1889).

⁷ *Sickles v. New Jersey Ice Co.*, 153 N. Y. 83.

⁸ *Hickey v. Boston & Lowell R. R.*, 14 Allen, 429. In this case, Wells, J., said: "If the injury happens while the passenger is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care. But when the plaintiff's own evidence shows that he left the place assigned for passengers, and was occupying an exposed position, and that the injury was due in part to the fact of such position, he must necessarily fail, unless he can make it appear, upon some ground of necessity or propriety, that his being in that position was consistent with the exercise of proper caution and care on his part. The front platform of a steam railway car, coming into a station, detached from the train, where the approach is complicated by side tracks, turnouts, and switches, and rendered more liable to accident by the operation of breaking up and transposing the train, while in motion, cannot be otherwise, comparatively, than a position of danger."

⁹ *Lucas v. New Bedford & Taunton R. R.*, 6 Gray, 64. See § 124, *ante*.

¹⁰ *Brooks v. Boston & Maine R. R.*, 135 Mass. 21; *Creamer v. West End Street Railway*, 156 Mass. 320; *Burden v. Lake Shore & M. S. R. R.*, 104 Mich. 101; *Jacob v. Flint & P. M. R. R.*, 105 Mich. 450. One who voluntarily and unnecessarily halts his team near a railroad track, on which a freight-train is standing, knowing that his horses are easily frightened at the noise of trains, cannot recover for injuries caused by

or to stand unnecessarily on a railway track to converse with friends.¹ But it is to be observed that the application of this rule is restricted, since the conduct of parties is generally determined in large measure by surrounding circumstances; which circumstances will be of weight in determining whether the particular act was or was not careless.² Thus, the degree of care required of one about crossing a public way, in respect of vehicles in the way, is less than that of one approaching a railway crossing, in respect of trains. And the traveller in an unfrequented road in the country will be bound to less watchfulness than one attempting to cross a city street.³ Where it is the duty of a landlord to keep the ceiling of a hallway in

reason of his horses becoming unmanageable when the customary signals for starting the train are given. *Hargis v. St. Louis, A. & T. R. R.*, 75 Tex. 19. It may be want of ordinary care for the plaintiff to remain in a house after he knows that it is being filled with illuminating gas escaping from a leak in the pipes; *Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Hunt v. Lowell Gas Light Co.*, 1 Allen, 343, at least if he fail to give notice to the gas company that the gas is escaping. *Ibid.*

¹ *Dell v. Phillips Glass Co.*, 169 Penn. St. 549.

² *Mayo v. Boston & Maine R. R.*, 104 Mass. 137; *Lyman v. Hampshire*, 140 Mass. 311; *Merritt v. New York, N. H. & H. R. R.*, 162 Mass. 326. Generally in such cases it is for the jury to consider, as bearing upon the question of due care, whether the situation, arrangement, and use of the defendant's premises were such as to invite the plaintiff to enter upon them. *Gaynor v. Old Colony & Newport R. R.*, 100 Mass. 208. So where the plaintiff was injured in attempting to cross the defendant's tracks near a station, it was held that the jury might consider what was the usage of passengers in crossing at that point, and whether this usage was known to the defendant, and acquiesced in by it. *Caswell v. Boston & Worcester R. R.*, 98 Mass. 194. But where a person, without looking for approaching trains, crossed a railroad track at a station, at a point where there was no planking provided for the use of passengers crossing, while such planking was provided at points above and below, it was held that he was guilty of contributory negligence. *Wheelwright v. Boston & Albany R. R.*, 135 Mass. 225. See *Stevens v. Oswego & Syracuse R. R.*, 18 N. Y. 422; *Warren v. Fitchburg R. R.*, 8 Allen, 227.

³ *Lynam v. Union Railway*, 114 Mass. 83; *Bowser v. Wellington*, 126 Mass. 391; *Shapleigh v. Wyman*, 134 Mass. 118. It is not as matter of law negligence in a pedestrian in a city street to cross behind a high loaded team before it has passed far enough to enable him to see another team coming from behind it on the other side. *Purtell v. Jordan*, 156 Mass. 573.

repair, contributory negligence cannot be imputed to a tenant who knew, and had informed the landlord, that it was in a dangerous condition, if he passes under such ceiling; it being necessary for him so to do in entering and leaving the house.¹

§ 144. **Entering Premises of Another: Obligation to use Senses.** — It has been stated that one who enters a place where he is exposed to peculiar danger, — as at the crossing of a railroad, — is bound to use his hearing and eyesight, to the best of his ability, in order to protect himself from injury.² And, generally, one who without excuse fails to use his senses upon entering the premises of another, and by reason of such failure is injured, will be held to be guilty of contributory negligence.³ But the degree of care to be exacted of him will

¹ *Dollard v. Roberts*, 8 N. Y. Supp. N. E. Rep. 432 (1890).

² See § 120, *ante*, notes and cases cited; *Shaw v. Boston & Worcester R. R.*, 8 Gray, 45, 73; *Sprow v. Boston & Albany R. R.* 163 Mass. 330.

³ Where the workmen who had loaded a freight car in the defendant's mills were required to propel it by hand out into the yard, and the defendant had caused a ditch to be dug across the track, the fact that the plaintiff was pulling upon the front end of the car with his face towards the ditch, in broad daylight, and that the ditch was plainly visible to one who looked towards it, was held by a majority of the court not to show conclusively that the plaintiff was guilty of contributory negligence, it appearing that, in doing his work, he must necessarily lean forward as he walked. Field, C. J., said: "The most formidable argument is that as it was daylight and, as the ditch was visible, and directly across his path, he would, if he had used due care, have seen it when hauling the car towards it, and would have avoided it. . . . His attention was necessarily more or less directed to his own work, which would naturally require him to lean forward and bend down towards the track. The car moving constantly forward would somewhat impair his freedom of action if he came upon the ditch without knowing beforehand that it was there; and it is impossible to say as matter of law that he was careless in putting himself in the position he was in, if he did not know of the ditch." *Gustafsen v. Washburn & Moen Manuf'g Co.*, 153 Mass. 468. In Illinois, an instruction to the effect that failure to look to see where one was going was contributory negligence was held erroneous, the question of negligence, in that State, being considered one of fact for the jury. *Chicago v. McLean*, 133 Ill. 148. Where one in charge of carloads of stock, walking on top of a moving train, as was customary, and not looking forward, was struck by a bridge, he was held not to be, as a matter of law, guilty of contributory negligence. *Chicago, M. & St. P. R. R. v. Carpenter*, 56 Fed. Rep.

vary in proportion with the actual danger of his surroundings and his own knowledge of such danger; so that circumstances which in one case might well furnish an excuse for the plaintiff's failure to use his eyesight, in another would not relieve him from the imputation of negligence. And it is obvious that the plaintiff will be held bound to a closer watchfulness if he is or ought to be aware of the presence of some special peril, than if he enters a place in fact dangerous, supposing it to be safe.¹ So, if the business upon which the plaintiff enters the premises is such as tends to distract his attention from his surroundings, and he has no reason to apprehend danger, the fact that his attention is so diverted may not prevent him from recovering for injuries received by reason of the unexpected danger.² As to travellers in the public highways, the strict obligation to use the senses of sight and hearing may be modified by the consideration that, ordinarily, the traveller has the right to assume that the public way or sidewalk is reasonably safe. So it has generally been held where accidents have occurred from a traveller falling into a hole or opening in the sidewalk, or coming into contact with an ob-

451, 5 C. C. A. 551. To the general rule, as stated in the text, see *Pennsylvania R. R. v. Bell*, 15 Atl. Rep. 561 (Penn. 1888); *Bertelson v. Chicago, Milwaukee & St. P. R. R.*, 40 N. W. Rep. 531 (Dak. 1888); *Guenther v. St. Louis, Iron Mt. & Southern R. R.*, 95 Mo. 286.

¹ It is not necessarily negligence for one having business there to enter premises where a sign is posted "Beware of the dog." *Sylvester v. Maag*, 155 Penn. St. 225.

² Thus where the defendant placed an unloaded freight car on its side track to be loaded by the plaintiff to be shipped over the defendant's road, and, while the plaintiff was engaged in loading the car, the defendant backed an engine upon the side track without warning, and ran into the car and injured the plaintiff, it was held that the plaintiff had a right to give his undivided attention to the work in which he was engaged, and to assume that the defendant would not disturb him without notice or warning. *Gessley v. Missouri Pacific R. R.*, 32 Mo. App. 413. A person in the defendant's railroad yard on business who is struck by a car while, standing on a track with his back towards the only direction of danger, is guilty of contributory negligence. *Diebold v. Pennsylvania R. R.*, 14 Atl. Rep. 576 (N. J. 1888). By P. L., N. J., 1869, p. 806, Revision, p. 920, § 67, it was provided that one injured while standing on a railroad track shall not recover against the road. It was held that this provision applies to persons standing on branch, as well as on main tracks. *Ibid*.

struction placed upon it, or slipping upon ice thereon, that the question of his contributory negligence is for the jury, although the plaintiff might have seen the danger, or his inability to see it was the result of his own act, as by approaching it in the darkness.¹

§ 145. *Illustrations of the Principles stated.*—It is held to be contributory negligence to enter a building in the dark unnecessarily. Thus where the plaintiff, by the defendant's permission, but not upon business, entered the defendant's building and fell into the well-hole of a staircase, and was injured, Pollock, C. B., said: "It is every one's duty to take care of his own safety, and not to go anywhere without a light, so as to know whither he is going and what dangers he is likely to meet."² And, the plaintiff being a mere licensee, it was held that it was not the duty of the defendant to light the passage or to see that the premises should be any different from what they were.³ But the rule may be different when the plaintiff enters the premises on business. Thus where the plaintiff went to the defendant in the evening to buy oats, and the parties went together in the dark to the upper floor of the granary to procure them, and the plaintiff while walking about the floor in the dark fell into a hole and was injured, it was held that he was not, as matter of law, barred from a recovery.⁴ Where the plaintiff had dined in the defendant's eating-house, and, on leaving, opened the wrong door, and, without looking, walked into a cellar-way and was injured, it was held that she was guilty of contributory negli-

¹ *Graves v. Battle Creek*, 95 Mich. 266; *Mackie v. West Bay City*, 106 Mich. 242; *Cumiskey v. Kenosha*, 87 Wis. 286; *Lichtenberger v. Meriden*, 91 Iowa, 45; *New York Life Ins. Co. v. Savage*, 58 Fed. Rep. 338, 7 C. C. A. 260, 19 U. S. App. 197. See § 164, *post*, and cases cited. Where one fell into a man-hole in a street, without looking, and no excuse for his failure to look appeared, he was held to be, as matter of law, guilty of contributory negligence. *Lumis v. Philadelphia Traction Co.*, 181 Penn. St. 268.

² *Wilkinson v. Farrie*, 9 Jur. (N. S.) 280. See *Maguire v. Little*, 13 Atl. Rep. 108 (R. I. 1888).

³ *Wilkinson v. Farrie*, 1 H. & C. 633.

⁴ *Pierce v. Whitcomb*, 48 Vt. 127.

gence.¹ But where the plaintiff went to the defendant's store to buy goods, and walked up the store without looking to see where she was going, her attention being directed to articles in the show-case, and she stepped into an open register-hole in the floor and was injured, it was held that the question of her negligence was for the jury.² It was held that a person on a ship who sat down on a "bunker-hatch" where persons were accustomed to sit, without looking to see if it was closed, and, it being open, fell into the hold and was injured, was guilty of contributory negligence.³ Where the plaintiff, an employee of the defendant, fell into an unguarded elevator shaft, in a room so dark that the opening could not be perceived until it was reached, it was held that he was not in the exercise of due care, it appearing that he knew that the opening was somewhere in the room, although he did not know exactly where, and that he was looking for it but walking very quickly.⁴ And where the plaintiff walked into a similar shaft left negligently unguarded in the defendant's factory, in broad daylight, there being nothing to prevent him from appreciating the danger had he used his eyesight, it was held that he was negligent, although he was ignorant of the existence of the shaft; and the court said: "A person who pays little heed to his surrounding, and goes hither and thither in an absent-minded manner, or thinking only of some particular object, and shutting his eyes to everything else, is guilty of . . . that want of ordinary care which the safety of society requires all sane persons of mature age to exercise."⁵ But where the plaintiff had reason to suppose that the door into the shaft had been opened by the defendant's servant, whose

¹ *Gaffney v. Brown*, 150 Mass. 479, and see *Jucht v. Behrens*, 7 N. Y. Sup. N. E. Rep. 195 (1889); *James v. Ford*, 9 N. Y. Sup. N. E. Rep. 504 (1890); *Schmidt v. Bauer*, 80 Cal. 565.

² *Hendricken v. Meadows*, 154 Mass. 599. See *Drennan v. Grady*, 167 Mass. 415.

³ *The Sir Garnet Wolseley*, 41 Fed. Rep. 896.

⁴ *Taylor v. Carew Manuf'g Co.*, 143 Mass. 470, and see *Kossman v. Stutz*, 5 N. Y. Sup. N. E. Rep. 764. See § 113, *ante*, n. 2.

⁵ *Hutchins v. Priestly Express Co.*, 61 Mich. 252, and see *Bedell v. Berkey*, 76 Mich. 435; *Huey v. Gahlenbeck*, 121 Penn. St. 238; *Harris v. Commercial Ice Co.*, 153 Penn. St. 278.

duty it was to attend to it, and so stepped into the shaft without looking to see if it was safe, it was held that the plaintiff was not, as matter of law, to be charged with negligence;¹ and so where the plaintiff had reason to believe that the safety devices attached to a freight elevator were in working order, which was not the case, and so trusted himself to the elevator and was injured.²

SECTION III.

OF PERSONS UNDER DISABILITY.

§ 146. **Physical Defects.** — A person feeble, maimed, or suffering from any physical defect or disability, is bound to exercise a proportionate care and watchfulness in circumstances which are rendered peculiarly dangerous to him by reason of his defect.³ Thus deafness imposes upon one about to cross a railway track the duty of using increased vigilance in looking for danger, and his failure to watch for approaching trains will be negligence.⁴ The mere fact of the existence of a disability is not conclusive to show that the plaintiff was negligent, and, ordinarily, the question will be submitted to the jury to be determined as one of fact. Thus, in an action for injuries caused by a defective street crossing, the fact that the plaintiff was short-sighted and wore spectacles is material as bearing upon the question of his negligence;⁵ and it is held generally that it is not, as matter of law, negligent for a blind man to walk the public streets unattended, if he is acquainted with the locality and has been in the habit of walking there.⁶

¹ *Tousey v. Roberts*, 114 N. Y. 312.

² *Carey v. Arlington Mills*, 148 Mass. 338.

³ *Cleveland, C. & C. R. R. v. Terry*, 8 Ohio St. 570; *Simms v. South Carolina R. R.*, 26 S. C. 490.

⁴ *International & G. N. R. R. v. Garcia*, 75 Tex. 583; *Tierney v. Chic. & N. W. R. R.*, 84 Iowa, 641; *Phillips v. Detroit, G. H. & M. R. R.*, 111 Mich. 274; *Schexnaydre v. Railroad*, 46 La. Ann. 248. So, as to crossing a street railway. *Schulte v. N. O. City, &c. R. R.*, 44 La. Ann. 248.

⁵ *Austin v. Ritz*, 72 Tex. 391.

⁶ *Sleeper v. Sanborn*, 52 N. H. 244; *Smith v. Wildes*, 143 Mass. 556; *Neff v. Wellesley*, 148 Mass. 487. In *Davenport v. Ruckman*, 37 N. Y.

But it is obvious that there may be circumstances which would make it negligence for the plaintiff to go where a person not suffering from disability might go without negligence. Thus it is apprehended that it would clearly be negligent for a person blind and deaf to attempt to cross a crowded street in a city, and it has been held to be contributory negligence for a deaf man to walk on a railway track.¹ Upon this subject it is said that any person of any age has a right to the use of the public highway either on foot or with any kind of vehicle or horses. But these rights are to be exercised with reference to the abilities of each person to take care of himself and of the rights of others. A blind, lame, or deaf person has a right to walk where other persons, not disabled, have the right. So it has been held that it is not, necessarily, contributory negligence for one almost blind to travel on a railway without an attendant.² But, in view of the incapacities for taking care of himself under which a blind man suffers, and of which he must be conscious, the exercise of ordinary caution requires that he should conduct himself with reference to his inability to see.³ And if he be unable to hear, so that he cannot take warning by the hearing of what is about him, or likely to put him in jeopardy, special wariness on his part, considering his infirmity of hearing, would be nothing more than the ordinary prudence of a man who cannot take of himself by listening.⁴

§ 147. *Intoxication.*—The mere fact that the plaintiff was intoxicated at the time of the injury is not sufficient to charge him with contributory negligence.⁵ But if it appears that the

568, it was held that the question for the jury was whether it was so improper for the plaintiff, she being partially blind, to go into the street unattended, that this would be contributory negligence on her part. See, also, *Sheridan v. Brooklyn, &c. R. R.*, 36 N. Y. 39; *Ferris v. Union Ferry Co.*, 36 N. Y. 319; *Rennick v. New York Central R. R.*, 36 N. Y. 132; *Ernst v. Hudson River R. R.*, 35 N. Y. 91.

¹ *Kennedy v. Denver, St. P. & P. R. R.*, 10 Col. 493, Beck, C. J., dissenting.

² *Railway Co. v. Maddrey*, 57 Ark. 306.

³ *Florida Central R. R. v. Williams*, 37 Fla. 406.

⁴ *Neff v. Wellesley*, 148 Mass. 487, 491; *Hall v. West End Street Railway*, 168 Mass. 461.

⁵ *Pluckwell v. Wilson*, 5 C. & P. 379; *Wynn v. Allard*, 5 W. & S. 524;

intoxication was the proximate cause of the accident, without which it could not have happened, then the plaintiff is to be charged with contributory negligence, and cannot recover for the injury.¹ So where an intoxicated person was injured in attempting to drive over a washout, which he could easily have seen and avoided had he been sober, it was held that his driving in that place, in an intoxicated condition, was contributory negligence.² A like rule has been held where the intoxicated person was walking on the track of a railroad and was there killed, it being impossible to stop the train in time to save his life;³ but where it appeared that the engineer of the defendant had poor eyesight, it was held that the question of the plaintiff's negligence was for the jury.⁴ It is clear that the fact that the plaintiff was intoxicated is not an excuse for failure on his part to use the care to be required of a sober man, under the same circumstances.⁵

Dickson v. Hollister, 123 Penn. St. 421; *Hershey v. Millcreek Commissioners*, 9 Atl. Rep. 452 (Pa. 1887); *Harrington v. N. Y. C. & H. R. R. R.*, 4 N. Y. Sup. N. E. Rep. 640 (1889); *Ford v. Umatilla County*, 15 Or. 313; *Enright v. Atlanta*, 78 Ga. 288; *East Tennessee & W. N. C. R. R. v. Winters*, 85 Tenn. 240; *Maguire v. Middlesex R. R.*, 115 Mass. 239; *Holland v. West End Street Railway*, 155 Mass. 387; *Baltimore & Ohio R. R. v. State*, 81 Md. 371; *Hankinson v. Charlotte, &c. R. R.*, 41 S. C. 1; *Northern Pac. R. R. v. Croft*, 29 U. S. App. 687.

¹ *Lynch v. New York*, 47 Hun, 524; and see *Fitzgerald v. Weston*, 52 Wis. 354; *Meyer v. King*, 72 Miss. 1. Where the plaintiff sued for injuries caused by falling down an embankment in the night, and it appeared that he was an inmate of an inebriate asylum and had been drinking all day, and that the night was clear and star-light, and that one could see two hundred feet ahead at the time of the accident, it was held that the plaintiff had failed to show that he was free from contributory negligence. *Monk v. New Utrecht*, 104 N. Y. 552.

² *Woods v. Tipton Commissioners*, 27 N. E. Rep. 611 (Ind. 1891).

³ *Memphis & Charleston R. R. v. Womack*, 84 Ala. 149.

⁴ *Troy v. Cape Fear & Y. V. R. R.*, 99 N. C. 298.

⁵ *Price v. Phil., W. & B. R. R.*, 84 Md. 506, and see *Louisville & N. R. R. v. Johnson*, 108 Ala. 62.

SECTION IV.

OF INFANTS AND THEIR PARENTS OR GUARDIANS.

§ 148. **General Rule.**—The degree of care to be required of a child, placed in circumstances of danger, is to be determined by considering the maturity and capacity of the child in relation to the circumstances of the case;¹ and it is generally held that a child is not to be held to the same degree of care as an adult.² The question is whether the child exercised such care as was reasonably to be expected from a person of his age and capacity, and the mere fact that he was old enough to know the probable consequences of the act which caused his injury will not conclusively determine that he was negligent, since it is not to be expected that a child will exercise the measure of prudence in avoiding danger that is to be expected of an adult. Thus where a boy thirteen years old struck a dog, and thereby incited the dog to bite him, it was said: "If the court had ruled that, if the plaintiff was old enough to know that striking the dog would be likely to

¹ *Lynch v. Nurdin*, 1 Q. B. 29; *Boss v. Litton*, 5 C. & P. 407; *Wright v. Malden & Melrose R. R.*, 4 Allen, 283; *Hayes v. Norcross*, 162 Mass. 546; *Robinson v. Cone*, 22 Vt. 213; *Daley v. Norwich & Worcester R. R.*, 26 Conn. 59; *Rauch v. Lloyd*, 31 Penn. St. 358; *Gillespie v. McGowan*, 100 Penn. St. 144; *Washington & Georgetown R. R. v. Gladmon*, 82 U. S. 401; *Brown v. European & N. A. Railway*, 58 Maine, 384; *Wendell v. New York Central & H. R. R. R.*, 91 N. Y. 420; *Ludwig v. Pillsbury*, 35 Minn. 256; *Achtenhagen v. Watertown*, 18 Wis. 331; *Messer v. Chicago, R. I. & Pac. R. R.*, 68 Iowa, 602; *Chicago, R. I. & Pac. R. R. v. Eininger*, 114 Ill. 79; *Murray v. Richmond & Danville R. R.*, 93 N. C. 92.

² See *Mangam v. Brooklyn R. R.*, 38 N. Y. 455; *Thurber v. Harlem R. R.*, 60 N. Y. 326; *Ihl v. Forty Second St. R. R.*, 47 N. Y. 317; *Costello v. Syracuse R. R.*, 65 Barb. 92; *Powers v. Harlow*, 57 Mich. 107; *Strong v. Stevens Point*, 62 Wis. 255; *Benton v. Chicago, R. I. & Pac. R. R.*, 55 Iowa, 496; *Muehlhausen v. St. Louis R. R.*, 91 Mo. 332; *Union Pacific R. R. v. Dundon*, 37 Kan. 1; *Miller v. Pennsylvania R. R.*, 8 Atl. Rep. 209 (Penn. 1887); *Central Trust Co. v. Wabash, St. L. & P. R. R.*, 31 Fed. Rep. 246. In this case the court assumed as matter of law, that an infant of six years old could not be guilty of contributory negligence. But see § 95, *ante*, notes and cases cited.

incite him to bite, he could not recover, it would have been erroneous. This is not the true test. It entirely disregards the thoughtlessness and heedlessness natural to boyhood. The plaintiff may have been old enough to know, if he stopped to reflect, that striking a dog would be likely to provoke him to bite, and yet, in striking him, he may have been acting as a boy of his age would ordinarily act under the same circumstances."¹ The application of the general rule is modified in those cases in which it is held that the owners of property owe a peculiar duty towards infants, although trespassers;² and there are cases which hold that infants of tender years are to be considered, as matter of law, incapable of contributory negligence;³ but the better opinion seem to be that the age of the infant is only a fact to be considered by the jury, in connection with the other facts of the case, in determining the question of negligence.⁴ It has been held that a different rule obtains when the right of the infant to sue is derived from a special contract made in his behalf by an adult in charge of him,⁵ but, unless his exception is to be considered as founded upon the doctrine of "imputed negligence,"⁶ it would seem to rest upon the erroneous assumption that the right of the plaintiff to sue in tort rests solely upon his con-

¹ *Plumley v. Birge*, 124 Mass. 57, and see *Munn v. Reed*, 4 Allen, 431; *Mulligan v. Curtis*, 100 Mass. 512; *Lynch v. Smith*, 104 Mass. 52.

² See §§ 75 *et seq.*, *ante*.

³ See *Baker v. Flint & Pere Marquette R. R.*, 68 Mich. 90, and § 95, *ante*, and cases cited.

⁴ See *Singleton v. Eastern Counties Railway*, 7 C. B. (N. S.) 287; *Daley v. Norwich & Worcester R. R.*, 26 Conn. 591; *Birge v. Gardiner*, 19 Conn. 507; *Elkins v. Boston & Albany R. R.*, 115 Mass. 190; *Dowd v. Chicopee*, 116 Mass. 93; *Brown v. Sherer*, 155 Mass. 83; *Johnson v. Kelleher*, 155 Mass. 125. A girl of eleven years of age entering a railroad crossing after the gates are closed, on her way to school, and so killed by a passing train, is guilty of contributory negligence. *Marden v. Boston & Albany R. R.*, 159 Mass. 393. And so is a boy of ten years who carelessly steps into an open man-hole in a public street. *Casey v. Malden*, 163 Mass. 507. See, also, *Howell v. Ill. Central R. R.*, 75 Miss. 242; *McGrell v. Buffalo O. B. Co.*, 153 N. Y. 265.

⁵ See *Waite v. Northeastern Railway, El. Bl. & El. 719*, as cited § 107, *ante*.

⁶ See § 107, *ante*.

tract with the defendant.¹ The question whether an infant is of sufficient age and capacity to appreciate circumstances of danger is generally one of fact;² but when the evidence on the question of contributory negligence or the assumption of risk is undisputed, and the inferences arising therefrom certain, the question need not be submitted to the jury.³

§ 149. *Negligence of Parent or Guardian.* — It has already been stated that, in some jurisdictions, it is held that the negligence of the parent, or other person in charge of a child not *sui juris*, has the same effect to prevent a recovery for an injury to the child that the like negligence on the part of the child himself would have had.⁴ In such cases, ordinary rules are applied to determine the question of contributory negligence, and the parent will be bound to that degree of care which ordinary men would exercise in like circumstances.⁵ If the undisputed facts are conclusive of negligence, it will be held, as matter of law, that the plaintiff cannot recover. Thus it is negligence to allow a young child to wander unattended about the streets of a large city,⁶ or upon the track of a railroad, and the mere fact that the parent or guardian was ignorant of the whereabouts of the child is not material upon the issue.⁷ The question whether the child was of such age

¹ See §§ 3, 5, *ante*.

² *Luebke v. Berlin M. Works*, 88 Wis. 442.

³ *Herold v. Pfister*, 92 Wis. 417.

⁴ See § 107, *ante*.

⁵ *Downs v. New York Central R. R.*, 47 N. Y. 83; *Cosgrove v. Ogden*, 49 N. Y. 255; *Mullency v. Spence*, 15 Abb. Pr. (N. S.) 519.

⁶ *Philadelphia & Reading R. R. v. Long*, 75 Penn. St. 265; *Gavin v. Chicago*, 97 Ill. 66; and see *Kerr v. Forgue*, 54 Ill. 482; *Chicago v. Major*, 18 Ill. 439; *Sheridan v. Brooklyn, &c. R. R.*, 36 N. Y. 39.

⁷ *Cauley v. Pittsburg, C. & St. L. R. R.*, 95 Penn. St. 398; *Long v. Phil. & R. R. R.*, 75 Penn. St. 257; *Dunsheath v. Pittsburg, &c. Traction Co.*, 161 Penn. St. 124. It is held that it is not, *prima facie*, negligence for a mother to permit her child, four years old, to play with a strange dog. *Munn v. Reed*, 4 Allen, 131. Where the parent left the child at the door of a store while she went into the store on business, and a counter left outside fell upon the child and injured it, it was held that the question of the contributory negligence of the parent was for the jury. *Kunz v. Troy*, 104 N. Y. 344.

and capacity as safely to be trusted abroad without a guardian is always one of fact for the jury.¹ It has been held, and it would seem with good reason, that if a child, although too young safely to be trusted to his own guidance, is injured, he may nevertheless recover for his injury if, in fact, he was in the exercise of due and proper care at the time of the accident, and the defendant was in fact culpably negligent; for in such a case, the fault of the defendant, not the negligence of the parent or guardian, is the proximate cause of the injury, and the law is inclined to regard as the proximate cause the nearest culpable act in the chain of causation. So, for example, "it does not necessarily follow, because a parent negligently suffers a child of tender years to cross a street, that therefore the child cannot recover. If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act which prudence would dictate, there has been no negligence which was directly contributory to the injury. The negligence of the parent in such a case would be remote. But if the child has not acted as reasonable care adapted to the circumstances of the case would dictate, and the parent has also negligently suffered him to be there, both these facts concurring constitute negligence which directly and immediately contributes to the injury."²

SECTION V.

OF EMPLOYEES.

§ 150. **General Rule applied : Modification of it.** — In actions brought by the servant against his master for injuries received by the servant in the course of his employment, through the negligence of the master, the ordinary rules are applied in

¹ *Lynch v. Smith*, 104 Mass. 52; *Powers v. Quincy & Boston Street Railway*, 163 Mass. 5; *Hewitt v. Taunton Street Railway*, 167 Mass. 483.

² *Lynch v. Smith*, 104 Mass. 52, and see §§ 97-101, *ante*, notes and cases cited.

determining the question of contributory negligence on the part of the servant.¹ But the general rule is, as to the employee, subject to an important qualification; since an employee, acting in the strict line of his duty, may properly do that which, in a stranger, would clearly be negligent, but which may not estop the employee from recovering against his master.² Thus it was held that it was not negligent for the employee of a railroad to step upon the track in the course of his duty, in the way of a train backing down upon him, he having reason to believe that the train would be stopped before reaching him.³ But the application of this rule is limited strictly to cases of necessity, and if the employee expose himself to a danger not in the line of his duty, he will be liable for his contributing negligence in like manner as a stranger.⁴ But the employee will not, as a matter of law, be precluded from a recovery, merely because he exercises his employment knowing the dangers to which it exposes him, or the existence of defects

¹ *Goodfellow v. Boston, Hartford & Erie R. R.*, 106 Mass. 461; *Ladd v. New Bedford R. R.*, 119 Mass. 412; *Lovejoy v. Boston & Lowell R. R.*, 125 Mass. 79; *Monaghan v. New York Central & H. R. R. R.*, 45 Hun, 113; *Powers v. New York, L. E. & W. R. R.*, 98 N. Y. 274; *Odell v. New York Central & H. R. R. R.*, 120 N. Y. 323.

² See *Maguire v. Fitchburg R. R.*, 146 Mass. 379; *Babcock v. Old Colony R. R.*, 150 Mass. 467. An employee is not bound, as matter of law, exactly to know and appreciate the risk of the work in which he is engaged, *Lawless v. Connecticut River R. R.*, 136 Mass. 1; *Ferren v. Old Colony R. R.*, 143 Mass. 197; for a servant, knowing the facts, may be wholly ignorant of the risks. *Clarke v. Holmes*, 7 H. & N. 937. So the fact that an employee on machinery knows that such machinery has not been guarded or protected by his master, as required by statute, is not conclusive of a want of due care on the employee's part. *Durrant v. Lexington Coal Mining Co.*, 97 Mo. 62. See § 204, *post*.

³ *Steele v. Central R. R. of Iowa*, 43 Iowa, 109; *Farley v. Chicago, Rock Island & Pacific R. R.*, 56 Iowa, 337; *Schultz v. Chicago & North Western R. R.*, 44 Wis. 638. See *Halliburton v. Wabash R. R.*, 58 Mo. App. 27; *Monahan v. Clay & Coal Co.*, 58 Mo. App. 68; *Warner v. Chic. R. I. & Pac. R. R.*, 62 Mo. App. 184. The measure of risk which a railroad fireman ought to incur by remaining on his engine and helping a sleeping engineer to run a train, is only that which his duty to the company imposes upon him. *Carroll v. East Tennessee, V. & G. R. R.*, 82 Ga. 452.

⁴ *Murphy v. Chicago, Rock Island & Pacific R. R.*, 38 Iowa, 539, 45 Iowa, 661; *Jones v. Baltimore & Potomac R. R.*, 95 U. S. 439.

in the means or appliances furnished him for doing it;¹ nor because at the time of the accident he was acting in violation of the rules of his employer, unless such violation contributes to the injury.² The application of the rules stated is often modified by the application of the doctrine of "Employees' Risk," which will be found considered elsewhere.³ But when the right of the employee to recover from his master for injuries received in the course of his employment depends only upon the question whether the servant was in the exercise of due care, like rules are applied as in cases where the action is between parties not in privity.⁴

§ 151. Illustrations of the Principle as to Railroad Employees.

—It has been held that the question of the contributory negligence of a railway employee is for the jury if such employee, in the line of his duty, fails to look for an approaching train, by which he is injured, since his attention may reasonably be diverted from it;⁵ or if, being required to do so by his superior, he boards a moving train in the line of his duty;⁶ or if he alights from a train moving at a rate of not more than four and one-half miles an hour.⁷ The employee will be bound to the exercise of a degree of care proportioned to the circumstances of danger into which his employment leads him, and

¹ *Snow v. Housatonic R. R.*, 8 Allen, 441.

² *Ford v. Fitchburg R. R.*, 110 Mass. 240. It is held in Massachusetts, that if the employment in which the servant is engaged is unlawful, as being carried on on the Lord's Day, in violation of a statute, the unlawful act of the servant is a contributing cause of the injury, so that he will be debarred from a recovery. See *Day v. Highland Street Railway*, 135 Mass. 113; *Read v. Boston & Albany R. R.*, 140 Mass. 199. But this would seem to be in contravention of the general rule that the unlawful act of a plaintiff shall not debar him from a recovery unless it is shown, in fact, to have directly contributed to the injury. See § 141, *ante*.

³ See §§ 203 *et seq.*, *post*.

⁴ *Riley v. Connecticut River R. R.*, 135 Mass. 292; *Blanchette v. Border City Mills*, 143 Mass. 150; *Barstow v. Old Colony R. R.*, 143 Mass. 535; *Spicer v. South Boston Iron Co.*, 138 Mass. 426; *Kossman v. Stutz*, 5 N. Y. Sup. N. E. Rep. 764 (1889).

⁵ *Collins v. New York, N. H. & H. R. R.*, 55 N. Y. S. C. 31.

⁶ *Pullutro v. Delaware, L. & W. R. R.*, 7 N. Y. Sup. N. E. Rep. 510 (1890).

⁷ *New York, P. & N. R. R. v. Colbourn*, 69 Md. 360.

the nature of his employment and the demand which it makes upon his attention are always to be considered in estimating his obligation, although the fact that the act alleged to be negligent was done in compliance with an established custom upon the railroad will not, alone, excuse it.¹ Where a brakeman, in the line of his duty, swung himself out from between two cars without looking, as he might have done, to see whether there were any obstructions near the track which might injure him, and through his failure to look was injured by such obstructions, it was held that he was guilty of contributory negligence.² But, in a similar case in which the element of negligence did not appear, it was held that the plaintiff was not debarred from a recovery.³ So, where a freight brakeman in the discharge of his duty was engaged in coupling cars, and was injured by being struck by a piece of timber which projected over the end of one of the cars, it was held that, as he had an opportunity of seeing and avoiding the danger, he was guilty of contributory negligence and could not recover for his injuries.⁴ It was held to be negligence for a railroad brakeman to couple cars upon the side of the train which was exposed to danger, when he might as well have performed that duty upon the other side of the train;⁵ but, generally, it is not negligence for a railway employee to go between moving cars, in the line of his duty, for the purpose of uncoupling them;⁶ and it is held not to be negligence

¹ *George v. Mobile & Ohio R. R.*, 109 Ala. 245, and see *Gordy v. New York, P. & N. R. R.*, 75 Md. 297.

² *Thompson v. Boston & Maine R. R.*, 153 Mass. 391. See *Vining v. New York & N. E. R. R.*, 167 Mass. 539.

³ *Babcock v. Old Colony R. R.*, 150 Mass. 467.

⁴ *Lothrop v. Fitchburg R. R.*, 150 Mass. 425. In a very similar case in the same State it was also held that the plaintiff could not recover, but this was upon the ground that, whether or not he was in the exercise of due care, there could be no doubt that the risk was assumed by the plaintiff as an employee. *Boyle v. New York & New England R. R.*, 151 Mass. 102. For a case in which an employee running an elevator was held to be debarred from a recovery for injuries received by him in the course of his employment, by reason of his lack of due care in operating the elevator, see *Murphy v. Webster*, 151 Mass. 121.

⁵ *Lothrop v. Fitchburg R. R.*, 150 Mass. 425.

⁶ *Eastman v. Lake Shore & M. S. R. R.*, 101 Mich. 597; *Curtis v. Chic. & N. W. R. R.*, 95 Wis. 460.

to make a coupling with defective apparatus, although the employee knows it to be defective, if he also knows that a collision must ensue if the coupling is not made, and, in making it, he acts under the orders of the engineer of the train.¹ A brakeman acting under orders to catch and climb a rapidly moving car, is not guilty of negligence in so doing.² A railway employee whose station is the top of a moving car, is not bound constantly to bear in mind the points at which the train will pass under bridges.³ A railway employee is not bound to anticipate extraordinary and improbable accidents.⁴ It is not necessarily contributory negligence for a railroad switchman to ride on the foot-board of the switch engine to which he is attached, while on duty;⁵ or for a brakeman to stand on the cross-bar of the pilot of an engine to make a coupling, this being necessary in order to do the work.⁶ But it was held to be negligence for an employee to jump from a moving engine, in front of it, and between the rails, when he might as easily have jumped to one side of the track.⁷ In an action by a brakeman against a railroad company for injuries received by being struck by a bridge while he was standing on the roof of a car engaged in his work, it appeared that the bridge was too low for him to pass under it while standing upright, and that he was familiar with the bridge, and was standing with his back to the engine, when he knew that the train was approaching the bridge. It was

¹ *Strong v. Ill. Cent. R. R.*, 94 Iowa, 380.

² *Fox v. Chic., St. P. & K. C. R. R.*, 86 Iowa, 409; *Harker v. Burlington, C. R. & N. R. R.*, 88 Iowa, 409. But see *Roul v. East Tenn., Va. & Ga. R. R.*, 85 Ga. 197.

³ *Wallace v. Central Vt. R. R.*, 138 N. Y. 302.

⁴ *McKee v. Chic., R. I. & Pac. R. R.*, 83 Iowa, 16. Where the plaintiff, a brakeman, did not know of the defective blocking of a frog over which he had to pass rapidly, in the line of his duty, it was held that the question of his contributory negligence was for the jury. *Kroener v. Chic., M. & St. P. R. R.*, 88 Iowa, 16. It is held to be negligence for an employee to get between the "deadwoods" of moving cars. *Ala. Great So. R. R. v. Richie*, 111 Ala. 297.

⁵ *Lockhart v. Little Rock & M. R. R.*, 40 Fed. Rep. 631.

⁶ *McDonald v. Mich. Cent. R. R.*, 108 Mich. 7. See *Benage v. Lake Shore & M. S. R. R.*, 102 Mich. 72.

⁷ *Dandie v. Southern Pacific R. R.*, 42 La. Ann. 686.

held that he was guilty of contributory negligence.¹ It was said to be negligence for a railway employee to jump upon a moving train, when he might have got on to it while it was at a standstill.²

§ 152. **Reliance on Signals and Warnings.**—A person engaged in a dangerous employment has a right to rely upon the customs which have obtained in the conduct of such employment, in the way of warnings, signals, or other precautions against danger on the part of his employer, or of his fellow-servants as representing his employer; and if, relying upon such warnings, he is injured by the failure to give them, he is not therefore guilty of contributory negligence;³ but it is held that a railway employee is not relieved of the duty of using his eyes, although engaged in an occupation which naturally draws his attention from approaching trains.⁴ Where the employee of a railroad, running a hand-car upon its track, was negligently run down and injured by the defendant's engineer, it was held that he was not, as matter of law, negligent in not running his hand-car from the track, which he might have done in time to avoid the collision, it appearing that he was given to understand by the conductor and engineer of the train which struck him that the train would not start within double the time which actually elapsed before he was struck.⁵ So the employee has a right to assume that his fellow-employees will regard his own signals showing his presence in a dangerous place, it being their duty so to do.⁶ But the fact that the employee acts in obedience to a

¹ *Williams v. Delaware, Lackawanna & Western R. R.*, 116 N. Y. 628.

² *Novock v. Michigan Central R. R.*, 63 Mich. 121.

³ *Iltis v. Chicago, Milwaukee & St. P. R. R.*, 40 Minn. 273; *Anderson v. Northern Mill Co.*, 42 Minn. 424; *Howard v. Delaware & Hudson Canal Co.*, 40 Fed. Rep. 195; and see *Cincinnati, I., St. L. & C. R. R. v. Lang*, 118 Ind. 579; *Hobson v. New Mexico & A. R. R.*, 11 Pac. Rep. 545 (Ariz. 1890); *Louisville & C. R. R. v. Utz*, 133 Ind. 443; *Richmond & D. R. R. v. Thompson*, 99 Ala. 471.

⁴ *Lynch v. Boston & Albany R. R.*, 159 Mass. 536. (But see *Lake Shore & M. S. R. R. v. Murphy*, 33 N. E. Rep. 403.)

⁵ *Hawley v. Chicago, Burlington & Quincy R. R.*, 71 Iowa, 717.

⁶ *Murphy v. New York Central & H. R. R. R.*, 118 N. Y. 527.

safety signal is not conclusive to show that he is not negligent, if the surrounding circumstances are such as would show a prudent man that it is dangerous to rely and act upon the signal.¹

§ 153. **Violations of Rules.** — Generally, if an employee of ordinary intelligence is injured by reason of his wilful disobedience of written or verbal orders, such disobedience being clearly negligent, he cannot recover for his injury as against his employer.² So, when it is clear that the violation of a rule of the employment, known to the plaintiff, was the proximate cause of his injury, he will, as matter of law, be deemed guilty of contributory negligence.³ But the mere fact of the violation of the rule is not conclusive of negligence,⁴ like principles being applied as in the cases where the party charged with negligence has been guilty of violation of a

¹ *Columbus & W. R. R. v. Bridges*, 80 Ala. 448.

² *Cullen v. National Sheet Metal Roofing Co.*, 114 N. Y. 45; *Karrer v. Detroit, G. H. & M. R. R.*, 76 Mich. 400.

³ *Sedgwick v. Illinois Central R. R.*, 76 Iowa, 340; *Alexander v. Louisville & Nashville R. R.*, 83 Ky. 589; *Louisville & Nashville R. R. v. Wilson*, 88 Tenn. 316; *Abend v. Terre Haute & I. R. R.*, 111 Ill. 202; *Quick v. Indianapolis & St. Louis R. R.*, 130 Ill. 334; *St. Louis, Iron Mt. & Southern R. R. v. Rice*, 51 Ark. 467; *Prather v. Richmond & Danville R. R.*, 80 Ga. 427; *Central Railroad & Banking Co. v. Kitchens*, 83 Ga. 83; *International & G. N. R. R. v. Hester*, 72 Tex. 40; *Lake Erie & Western R. R. v. Craig*, 47 U. S. App. 647; *Richmond & D. R. R. v. Pannill*, 89 Va. 552; *Richmond & D. R. R. v. Dudley*, 90 Va. 304; *White v. Louisville, N. O. & T. R. R.*, 72 Miss. 12.

⁴ *Louisville & Nashville R. R. v. Perry*, 87 Ala. 392. So it is said that the rules of a railway company requiring that engineers, when the view is obscured, shall control their engines so that they can stop within range of their vision; that delayed trains must run with great caution; that all trains must approach stations with reduced speed; and that, in approaching switches, the greatest care must be taken; do not increase the liability of engineers, but simply call their attention to their common-law duty of using due skill and diligence. *Lake Shore & Michigan Southern R. R. v. Parker*, 131 Ill. 557. See *Fairman v. Boston & Albany R. R.*, 169 Mass. 170. In *Sullivan v. Fitchburg R. R.*, 161 Mass. 125, it was held by a majority of the court, in favor of the defendant, that a rule of a railroad, that wild trains "must run cautiously around curves and over grade crossings, looking out for trackmen," was to be construed as having reference to the safety of trains, not of the trackmen.

statute or ordinance.¹ Thus, one employed by a railroad corporation as a locomotive engineer is not debarred from recovering damages against the corporation for injuries caused by a defect in the locomotive, by the fact that he was acting in intentional violation of the rules of the road, unless the accident was due in whole or in part to such violation.² It is generally a question of fact whether the failure to observe a particular rule was the proximate cause of the injury complained of.³ It is the duty of a railway employee to inform himself as to the rules of the road,⁴ and to observe them according to their plain tenor, and not according to what may have been the practice of other employees,⁵ unless he is compelled by the positive orders of the company to violate them, or such violation becomes necessary, under the system of management adopted by the company, in order to the doing of the work required of him;⁶ or unless such violation is general on the road and acquiesced in by the responsible officers of the company. A servant is not negligent in not knowing rules which never have been brought to his attention.⁷ And so it is held that the rules of a railroad company are not obligatory, as such, upon its servants who have not actual notice of them, and to whom they have never been promulgated. Notice of the rules must be actual in order to charge the servant; and it is held that the servant is not to be taken as affected with

¹ See § 141, *ante*; *Fickett v. Lisbon Falls Fibre Co.*, 91 Maine, 268.

² *Ford v. Fitchburg R. R.*, 110 Mass. 240, and see *Clarke v. Holmes*, 7 H. & N. 987.

³ *Horan v. Chic., St. P. & C. R. R.*, 89 Iowa, 328.

⁴ *Gulf, Col. & Santa Fe R. R. v. McMahan*, 6 Tex. App. 601.

⁵ *Gordy v. New York, P. & N. R. R.*, 75 Md. 297.

⁶ *Wilson v. Mich. Cent. R. R.*, 94 Mich. 20; *Holmes v. South. Pac. Co.*, 120 Cal. 357. A rule forbidding railway employees to go between cars in motion for the purpose of coupling or uncoupling them is reasonable; but it must be taken with the qualification that the company will provide other means for performing the necessary service; and if it fail to do this, the rule is no protection to the company against liability for damages for injuries sustained in doing the work in violation of the rule. *Memphis & C. R. R. v. Graham*, 94 Ala. 545.

⁷ *Le Croy v. New York, L. E. & W. R. R.*, 10 N. Y. Sup. N. E. Rep. 382; *Fay v. Minn. & St. L. R. R.*, 30 Minn. 231; *Memphis & C. R. R. v. Graham*, 94 Ala. 545; *Louisville & N. R. R. v. Mothershed*, 110 Ala. 113.

notice merely because his immediate superior has notice, if the servant is in fact ignorant;¹ but if it was the duty of the employee to make himself acquainted with the rule, and he failed to do this, having an opportunity to make himself acquainted with it, he will be charged with negligence.² If a railroad waives its rules by permitting or requiring its employees to disregard them, the disobedience of the rules by the employee doing his work in the customary manner, will not, of necessity, be contributory negligence;³ since the master cannot be permitted to set up as a defence against the consequences of his own negligence the breach of a rule by his servant, the customary violation of which rule the master has directed or acquiesced in.⁴

§ 154. **Illustrations of the Principles stated.**— While, upon the question of contributory negligence, it is proper for the jury to consider the fact that the order which had been violated was unreasonable,⁵ it is apprehended that the question whether, under the circumstances, the rules are reasonable, and so obligatory on the employee, is a question of law.⁶ Where it was contended that the plaintiff was negligent in making a “flying switch” contrary to the rule of the corporation,

¹ *Covey v. Hannibal & St. Jo. R. R.*, 27 Mo. App. 17; *Central R. R. of Georgia v. Ryles*, 84 Ga. 420; *Carroll v. East Tennessee, Va. & Ga. R. R.*, 82 Ga. 452.

² Thus it was held that where copies of the rules of the defendant had been duly distributed among its station foremen, a section hand was to be charged with notice of them, *Shenandoah Valley R. R. v. Luccado*, 86 Va. 390; and that the rules of a railroad company were admissible in evidence although the conductor charged with violating them had never seen them, it being his duty to acquaint himself with them. *Alexander v. Louisville & Nashville R. R.*, 83 Ky. 589.

³ *Lowe v. Chic., St. P. & C. R. R.*, 89 Iowa, 420; *Strong v. Ill. Cent. R. R.*, 94 Iowa, 380; *Fisk v. Ill. Cent. R. R.*, 96 Iowa, 702; *Fay v. Minn. & St. L. R. R.*, 30 Minn. 231; *Alabama Gt. So. R. R. v. Roach*, 110 Ala. 266; *Kansas City, Fort Smith & Gulf R. R. v. Kier*, 41 Kan. 661; *Barry v. Hannibal & St. Jo. R. R.*, 98 Mo. 62. But see *Richmond & D. R. R. v. Rush*, 71 Miss. 987.

⁴ *Knickerbocker Ice Co. v. Finn*, 51 U. S. App. 256.

⁵ *Prather v. Richmond & Danville R. R.*, 80 Ga. 427.

⁶ *Kansas & Ar. Valley R. R. v. Dye*, 36 U. S. App. 23.

it was held that he might recover, it appearing that making such a switch was the only practicable means of sending cars upon a side-track, and that it was the method of doing this customarily adopted on the defendant's road.¹ Where a plaintiff violated one rule of the road in order to avoid violating another and possibly a more important rule, it was held that the question of his negligence, under the circumstances, was for the jury.² In an action by a railway engineer against the company for personal injuries, the defendant contended that the plaintiff was guilty of contributory negligence because he was running at a greater rate of speed than he was instructed to run, and because the defendant's rules limited the speed to a certain rate before crossing trestles; the accident having happened near a trestle, when the plaintiff was exceeding that rate. It appeared that the plaintiff had been over the road but once before, did not know that the trestle was near, and had never seen or read the train rules. It was held that the question of contributory negligence was for the jury.³ It was held that a rule prohibiting freight trains from running at a speed exceeding fifteen miles an hour, exclusive of stops, was not violated by running occasionally at a greater speed, provided the actual rate of speed did not exceed fifteen miles in an hour of running time.⁴

SECTION VI.

OF PASSENGERS.

§ 155. **General Rule of Responsibility.**—The essential element of contributory negligence on the part of a passenger injured by an accident to the railroad car, or other vehicle in which he is travelling, is his disregard of some risk which he

¹ *Alexander v. Louisville & Nashville R. R.*, 83 Ky. 589; *Union Pacific R. R. v. Springsteen*, 41 Kan. 724.

² *Sutherland v. Troy & Boston R. R.*, 8 N. Y. Sup. N. E. Rep. 85 (1890).

³ *Dunlap v. Northeastern R. R.*, 130 U. S. 649.

⁴ *Sutherland v. Troy & Boston R. R.*, 8 N. Y. Sup. N. E. Rep. 83.

ought fairly to have anticipated.¹ The passenger has a right to expect that the carrier will provide all safe and suitable means and appliances for carrying on the business of transporting passengers, and to trust himself to be transported to the end of his journey by such means as the carrier provides; nor, unless the vehicles or fixtures furnished are obviously dangerous or insufficient, is the traveller put upon inquiry to see that these are sound and safe.² Thus, if a passenger takes a seat in a railway car which would be more dangerous than another in the case of a collision, his doing this is not negligence,³ although the greater danger of the position be obvious,⁴ or he has been forbidden to remain in that particular place.⁵ In the case of accident, the passenger is bound to exercise reasonable prudence in looking out for his own safety, but he is not bound to use the highest conceivable prudence; and the circumstances of confusion, distress, or dismay into which he may thus suddenly be thrown are to be considered upon the question of his contributory negligence. And an act done by a passenger, in the face of impending danger, for the purpose of escaping it, may not in law constitute contributory negligence, although in fact it may have contributed to produce the injury;⁶ as, where a passenger in a dangerous emergency jumped from a moving car to save himself, and was injured, although if he had remained in the car he would have escaped injury.⁷

§ 156. **Violation of Rules of the Carrier: Evasion of Fare: Waiver of Rule.** — A carrier of passengers has a right to make reasonable rules for the regulation of his business and to

¹ *Terry v. Jewett*, 17 Hun, 400, 78 N. Y. 345; *Gray v. Bell*, 5 Am. Rep. 371.

² *Willis v. Long Island R. R.*, 34 N. Y. 670; and see §§ 113, 118, *ante*.

³ *Creed v. Pennsylvania R. R.*, 17 Abb. L. J. 364; *Willis v. Long Island R. R.*, 32 Barb. 398, 34 N. Y. 670; *Rounds v. Delaware, Lackawanna & W. R. R.*, 64 N. Y. 129, 138.

⁴ *Carroll v. New York, N. H. & H. R. R.*, 1 Duer, 571, 6 Duer, 415; *Haley v. Earle*, 30 N. Y. 208.

⁵ *Colegrove v. New Haven & Harlem R. R.*, 20 N. Y. 492.

⁶ *Stokes v. Saltonstall*, 13 Pet. 181; *Ladd v. Foster*, 31 Fed. Rep. 827.

⁷ *South Covington & C. Street Railway v. Ware*, 84 Ky. 267; *Cody v. New York & N. E. R. R.*, 151 Mass. 462.

secure the safety of the passengers ; and if a passenger violates such a reasonable rule, and such violation contributes to his injury, he cannot recover therefor.¹ The question whether the rule alleged to have been violated in any case is reasonable, is for the court. Thus rules have been held to be reasonable which prohibited passengers from riding in baggage cars,² or in freight cars,³ or from putting their heads or arms out of the windows ;⁴ or from riding on the platforms of the cars,⁵ or from entering trains except at suitable places provided for that purpose.⁶ So a rule is reasonable under which a carrier refuses to transport an intoxicated person.⁷ It seems that, whether the case is covered by a rule or not, the carrier may remove from his car or vehicle a person who, by reason of intoxication or otherwise, is in such a condition as to render it reasonably certain that he will become offensive or annoying to other passengers, although he has not committed any offence or annoyance.⁸ This rule is justified by the consideration that the carrier owes to his passengers the duty of seeing that they do not suffer insult or violence while being carried to their destination, whether at the hands of the carrier's servants, or of their fellow-passengers carried in the same conveyance.⁹ The rule may properly be admitted in evidence, although unknown to the plaintiff, for the purpose of justifying the conduct of the defendant's servants, as in ejecting the plaintiff from the defendant's car, the plaintiff appearing to be intoxicated, and the rule of the defendant for-

¹ *Wills v. Lynn & Boston R. R.*, 129 Mass. 351; *Werle v. Long Island R. R.*, 98 N. Y. 650; *Chicago, M. & St. P. R. R. v. Myers*, 49 U. S. App. 279.

² *Pennsylvania R. R. v. Langdon*, 92 Penn. St. 91.

³ *Murch v. Concord R. R.*, 29 N. H. 9.

⁴ *Pittsburg & C. R. R. v. McClurg*, 56 Penn. St. 294.

⁵ *Wills v. Lynn & Boston R. R.*, 129 Mass. 351.

⁶ *McDonald v. Chicago & Northwestern R. R.*, 26 Iowa, 124; *Pennsylvania R. R. v. Zebe*, 33 Penn. St. 326.

⁷ *McGinnis v. Missouri Pacific R. R.*, 31 Mo. App. 399; *Spohn v. Missouri Pacific R. R.*, 87 Mo. 74.

⁸ *Vinton v. Middlesex R. R.*, 11 Allen, 304; *Murphy v. Union Railway*, 118 Mass. 328.

⁹ See § 38, *ante*, and cases cited.

bidding the carriage of intoxicated persons.¹ When the facts are undisputed, the question of the plaintiff's negligence may be for the court; but when it is doubtful whether or not the violation contributed to cause the injury, the question of negligence will be for the jury.² The assent of the passenger to all reasonable rules and regulations of the carrier which have been brought to his knowledge, is to be implied.³ The decisions in these cases rest upon the principle that while the carrier owes a common-law duty to the passenger, yet, in the case of a passenger for hire, the relation between the parties is created by the contract,⁴ and may be terminated by the wrongful act of the passenger in breach of the contract. Thus, the passenger is bound to pay his fare on a reasonable demand being made therefor; and if he wilfully refuses to do so, his rights under the contract cease by his own act, and he cannot insist on its fulfilment by the carrier.⁵ This is a statutory

¹ *O'Neill v. Lynn & Boston R. R.*, 155 Mass. 371.

² See § 153, *ante*.

³ *Sullivan v. Pennsylvania R. R.*, 30 Penn. St. 238. Where a passenger, who was smoking entered the smoking compartment of a car and finding all the seats occupied, passed into the adjacent baggage compartment and there remained until a collision by which he was injured occurred, there being a rule of which he was ignorant prohibiting passengers from riding in baggage cars; it was held that he took the risk of injury from dangers inherent in the construction or use of the car in the carrying of baggage; but not of injury from an extraneous cause, such as a collision. *New York, L. E. & W. R. R. v. Ball*, 53 N. J. L. 283.

⁴ See §§ 5, 6, *ante*.

⁵ One who refuses to pay his fare on a railway train, and persists in riding thereon, against the order of the conductor, stands in the position of a trespasser, and the railroad will not be liable to him unless for wanton or malicious injuries. See *Toledo, Wabash & Western R. R. v. Brooks*, 81 Ill. 293; *Gulf, C. & S. F. R. R. v. Greenlee*, 62 Tex. 344. The injured passenger, in order to recover damages, must not only be free from contributory negligence but from fraud on the defendant carrier. *Toledo, Wabash & W. R. R. v. Brooks*, 81 Ill. 293. Where a railroad corporation was, by law, obliged to transport infants under three years of age, free of charge, a woman bought a ticket for herself but none for a child three years and two months old, and, with the child in her arms, went on board the train, where the child was injured by reason of the defendant's negligence as carrier. No inquiry having been made by the defendant as to the age of the child, and the jury having found that there was no intention on the part of the mother to defraud the company, it

rule in many of the States, and is likewise a rule of the common law. The carrier, therefore, may refuse to transport the passenger further, and may expel him from its train or vehicle; nor can the person so expelled reinstate himself as a passenger by offering to pay his fare after his ejection, for his right to demand the complete execution of the contract is defeated by his refusal to do that which was either a condition precedent or a concurrent consideration on his part.¹ One who leaves a train in motion thereby ceases to be a passenger;² but it is held that one who, having purchased a ticket, boards the wrong train by mistake, is entitled while he remains there to be protected as a passenger.³ Although a railway carrier is not bound to receive passengers except at its regular stations, and a person boarding a train at a place not a station is *prima facie* a trespasser,⁴ yet if he so take the train at the invitation, express or implied, of the carrier, intending to pay his fare as a passenger, he becomes such; and it may be inferred that the carrier received him as such, if its servants permit him to board the train and receive his fare.⁵ Generally, if the carrier permits its rules regulating the rights and conduct of passengers to be customarily disregarded, a practical invitation on the carrier's part to disregard the rule may be inferred, and the existence of the rule will not avail as a defence in an action against the carrier.⁶ So an invitation by the servant of the carrier to violate the rule, as to ride in a forbidden place or to enter a vehicle in motion, may amount to a waiver of the rule by the carrier; and the question whether there is such a waiver is generally one of fact.⁷ And

was held that the child was entitled to recover for its injuries. *Austin v. Great Western R. R.*, 2 Q. B. 449.

¹ *O'Brien v. Boston & Worcester R. R.*, 15 Gray, 20; *Stephen v. Smith*, 29 Vt. 160; *Hibbard v. New York & Erie R. R.*, 15 N. Y. 455.

² *Commonwealth v. Boston & Maine R. R.*, 129 Mass. 500.

³ *Columbus, C. & I. R. R. v. Powell*, 40 Ind. 37.

⁴ *Murch v. Concord R. R.*, 29 N. H. 9.

⁵ *Merrill v. Eastern R. R.*, 139 Mass. 238; *Dewire v. Boston & Maine R. R.*, 148 Mass. 343.

⁶ *McNee v. Colburn Trolley Track Co.*, 170 Mass. 283.

⁷ *Waterbury v. N. Y. C. & H. R. R. R.*, 17 Fed Rep. 671; *North Chicago, &c. Railway v. Williams*, 140 Ill. 275.

the same rules apply when the rule is created by a statutory regulation.¹

§ 157. **Conduct of Passengers on Railway Trains; at Stations:** **Invitation.** — The passenger is not negligent if his conduct is such as in the judgment of reasonable men is prudent and proper under the circumstances. The passenger is not bound to look out for hidden defects or dangers, and so may choose his position or seat in the car or vehicle.² But where the passenger without excuse puts himself in a place not intended for passengers, as where he voluntarily and unnecessarily stands upon the platform of a railway car, he is, as matter of law, guilty of contributory negligence.³ If the passenger is physically deficient, he is bound to govern himself accordingly; thus it was held that a lame woman, who, in attempting to pass from one moving railway car to another, stepped without necessity upon the "buffers" between the platforms

¹ *Baltimore & Ohio R. R. v. Myers*, 18 U. S. App. 569.

² See § 155, *ante*. If a person voluntarily takes passage as passenger upon a freight train of a railroad which provides passenger trains, he has a right to require such security only as the mode of conveyance which he has chosen may be expected to furnish. *Harris v. Hannibal & St. Jo. R. R.*, 89 Mo. 233; *Crine v. East Tennessee, V. & G. R. R.*, 84 Ga. 651. A passenger who voluntarily assumes the duties of a trainman, although at the request of the carrier's servants, takes the risk of resulting injuries. *Atchison, Topeka & Santa Fe R. R. v. Lindley*, 42 Kan. 714.

³ *Hickey v. Boston & Lowell R. R.*, 14 Allen, 429. See *New York, L. E. & W. R. R. v. Ball*, 53 N. J. L. 283, as cited *ante*, § 156, *u*. Although it may be negligence for a passenger to ride unnecessarily upon the platform of a car, yet there may be such excuse for his doing so as will take the case out of the general rule; as where a passenger had walked through a train in the vain search for a seat, and was, when he was injured, standing upon the platform and looking into the car in the further search for a seat. *Dewire v. Boston & Maine R. R.*, 148 Mass. 343; *Willis v. Long Island R. R.*, 34 N. Y. 670, 682, 683. So the fact that a passenger, in apprehension of a collision, leaves his seat and goes upon the platform is not conclusive of his negligence. *Collins v. Albany & Schenectady R. R.*, 12 Barb. 492. A shipper of stock upon a railroad may not be guilty of contributory negligence who uses the only platform provided by the railroad company for that purpose, and is injured in so doing, although he knows the platform to be unsafe. *White v. Cincinnati, N. O. & T. P. R. R.*, 89 Ky. 478.

and was injured, was guilty of contributory negligence.¹ Where a passenger on a railway voluntarily thrust his arm out of an open window of the car in which he was riding, and was injured by the swinging against it of an unfastened door of a car of the defendant passing on the parallel track, this was held conclusive of his negligence.² But it was held not to be negligence for a passenger to ride with his arm on the sill of a car-window, when, by the shock of a collision, his arm was jarred outside of the window and so broken.³ It is considered that, in many circumstances, a street-car passenger, riding with part of his body projecting beyond the line of the car, cannot be said, as matter of law, to be guilty of negligence, or to assume the risk of contact with things outside the car. But a street-car passenger may intentionally or deliberately put his head or part of his body outside of or beyond the line of the car under such circumstances as to make it plain, as matter of law, that he is not in the exercise of due care.⁴ It has been held not to be negligent, as matter of law, to ride on the platform of a moving steam car;⁵ but the better rule would seem to be that there must be some justification for such action, and that whether such justification exists is a question for the jury.⁶ But it is clear that it is not negli-

¹ *Snowden v. Boston & Maine R. R.*, 151 Mass. 220.

² *Todd v. Old Colony & Newport R. R.*, 7 Allen, 207. See, also, *Holbrook v. Utica & Syracuse R. R.*, 12 N. Y. 236; *Pittsburg & C. R. R. v. Andrews*, 39 Md. 329; *Spencer v. Milwaukee & Pont du Chien R. R.*, 17 Wis. 487; *Louisville & Nashville R. R. v. Sickings*, 5 Bush, 1; *Summers v. Crescent City R. R.*, 34 La. Ann. 139; *Moore v. Edison Ill. Co.*, 43 La. Ann. 792; *Pittsburg & C. R. R. v. McClurg*, 56 Penn. St. 294; *Indianapolis & C. R. R. v. Rutherford*, 29 Ind. 82; *Dun v. Seaboard & Roanoke R. R.*, 78 Va. 645. In *Laing v. Colder*, 8 Penn. St. 479, it was held, if the plaintiff travelling in the defendant's railroad car permitted his hand to project from the window, so that his arm was broken by striking a bridge, that the defendant would not be liable for the injury if it gave timely notice of the danger, which the plaintiff might have avoided.

³ *Farlow v. Kelly*, 108 U. S. 288, and see *Francis v. New York Steam Co.*, 114 N. Y. 380; *Miller v. St. Louis R. R.*, 5 Mo. App. 471; *Dahlberg v. Minn. St. R. R.*, 32 Minn. 404.

⁴ *Cummings v. Worcester, &c. Railway*, 166 Mass. 220. See § 159, *post*.

⁵ *Choate v. Mo. Pac. R. R.*, 67 Mo. App. 105; *Chicago & Alton R. R. v. Fisher*, 141 Ill. 614.

⁶ *Baltimore & Ohio R. R. v. Myers*, 18 U. S. App. 569. It is obvious

gence *per se* to ride on the platform of a street car.¹ It is not negligence to ride in a baggage car, when this is the only conveyance provided by the carrier;² otherwise to ride on a locomotive, although by invitation of the engineer.³ It is generally a question of fact whether a passenger is negligent in riding upon the longitudinal footboard of a street car,⁴ although to do so may be, under some circumstances, negligence *per se*.⁵ It has been held to be unjustifiable negligence under any circumstances for a passenger to pass from one car to another, the train being in motion;⁶ but it is to be doubted whether such a rule can be sustained,⁷ and it is held that the presence on a train of vestibule cars is an invitation to the passenger to pass from one car to another, and that he has a right to assume that he may do this safely.⁸ The degree of care to be exacted of a passenger, or one lawfully accompanying him, on approaching or leaving a railroad station by the usual route, is to be measured by the circumstances of danger; but if the situation and aspect of the place are such as apparently to hold it out to the plaintiff as being a suitable place to approach or leave the train or to cross the track, he will be considered to act by the defendant's invitation, and will not be held to so rigorous a care as upon approaching an ordinary crossing.⁹ So, if a passenger alights from his train

that a passenger riding on a car platform will not be barred of recovery for an injury received while so riding unless his negligence in so doing contributed to the accident. *Kansas & Ar. Valley R. R. v. White*, 32 U. S. App. 192.

¹ *Watson v. Portland Railway*, 91 Maine, 584; *Seigel v. Eisen*, 41 Cal. 109; *Pray v. Omaha Street Railway*, 44 Neb. 167.

² *Baltimore & Potomac R. R. v. Swann*, 81 Md. 400.

³ *Texas & Pac. R. R. v. Boyd*, 6 Tex. Civ. App. 205.

⁴ *City Railway v. Lee*, 30 N. J. L. 435; *Elliott v. Newport Street Railway*, 18 R. I. 707.

⁵ *Sharkey v. Lake Roland Railway Co.*, 84 Md. 163.

⁶ *Bemis v. N. O. City, &c. R. R.*, 47 La. Ann. 1671; *Jamison v. Chesapeake & Ohio R. R.*, 92 Va. 327.

⁷ *Chesapeake & Ohio R. R. v. Clowes*, 93 Va. 189.

⁸ *Bronson v. Oakes*, 40 U. S. App. 413.

⁹ *Gaynor v. Old Colony & Newport R. R.*, 100 Mass. 208; *Chaffee v. Boston & Lowell R. R.*, 104 Mass. 108, 115; *Wheelock v. Boston & Albany R. R.*, 105 Mass. 203. See *Atchison, Topeka & Santa Fe R. R. v.*

upon a track running by the side of the train, instead of upon the platform provided for the purpose, it has been held that the question whether he is negligent may be for the jury.¹ So, where a person, in order to purchase a ticket, crossed the track in the night against the posted rules of the defendant, and while recrossing was injured, it was held that the question of his contributory negligence was for the jury.² It has been held negligence, as matter of law, for a person alighting from a train standing at a station to cross a parallel track without looking to see if another train is approaching thereon, although a rule of the road prohibits trains from crossing each other at a station;³ but the rule thus laid down is criticised, it being held that whether a person whose duty it is to receive mail and express matter from a train (such person being entitled to the rights of a passenger, as to protection from accident)⁴ is guilty of contributory negligence in going upon an intervening track for that purpose, without looking to see if a train is approaching on that track, is a question of fact.⁵

§ 158. Leaving or Boarding Moving Trains: Questions of Law and Fact. — It is not, necessarily, as a matter of law, negligent for a passenger to enter or leave a moving train, and the question whether it is negligence in a particular case will

Jones, 36 Kan. 769; *Riggs v. Boston, Revere Beach & Lynn R. R.*, 158 Mass. 309.

¹ *Robostelli v. New York, N. H. & H. R. R.*, 33 Fed. Rep. 796. Where a passenger left a safe place, designated as temporary station, and approached burning oil tanks, on the track, which exploded and injured him, he was held to be guilty of contributory negligence. *Conroy v. Chicago, St. P. & C. R. R.*, 96 Wis. 243.

² *Dublin, Wicklow & Wexford Railway v. Slattery*, L. R. 3 App. Cas. 1155, Lords Hatherley, Coleridge, and Blackburn dissenting. See *Debbins v. Old Colony R. R.*, 154 Mass. 402; *Connolly v. New York & N. E. R. R.*, 158 Mass. 8.

³ *Debbins v. Old Colony R. R.*, 154 Mass. 402; *Connolly v. New York & N. E. R. R.*, 158 Mass. 8.

⁴ See § 114, *ante*.

⁵ *Tubbs v. Mich. Cent. R. R.*, 107 Mich. 108. See *Klein v. Jewett*, 26 N. J. Eq. 474; *Terry v. Jewett*, 78 N. Y. 338; *Denver, &c. R. R. v. Hodgson*, 18 Col. 117; *Penn. Co. v. McCaffrey*, 173 Ill. 173.

depend upon the circumstances of danger attending the act and the special justification which the passenger had for doing it.¹ Thus where the plaintiff alighted from a train of cars moving at a rate of not more than two miles an hour, it was held that the question whether he was negligent was for the jury;² and so where the alleged contributory negligence consisted in boarding a train after the signal to start had been given, the court saying that even if the plaintiff knew that the signal had been given, he might reasonably believe that he could get safely on board before the train should start.³ It is, however, obvious that to alight from a rapidly moving train will, ordinarily, be negligence so as to prevent a recovery for the resulting injury, unless the passenger do this to escape from an imminent peril, in which case the question will be for the jury.⁴ Where a passenger alighted from a train in motion under circumstances which rendered the act, *per se*, negligent, it was held that the circumstance that the brakeman had called out the name of the station which the train was approaching, and had fastened back the door of the car,

¹ See *Int. & Gt. North. R. R. v. Satterwhite*, 15 Tex. Civ. App. 102; *Bouknight v. Charlotte, &c. R. R.*, 41 S. C. 415; *Omaha & R. V. R. R. v. Chollette*, 33 Neb. 143; *Chic., B. & Q. R. R. v. Landauer*, 36 Neb. 642; *St. Joseph & G. I. R. R. v. Hedge*, 44 Neb. 448.

² *Pennsylvania Co. v. Marion*, 123 Ind. 425; *Distler v. Long Island R. R.*, 151 N. Y. 424; *Sanderson v. Mo. Pac. R. R.*, 64 Mo. App. 655. But see *Murray v. Penn. R. R.*, 173 Penn. St. 74. A person is not excused for leaving a train in motion, it having just left a station, because it did not stop at the station for the length of time required by law. *Galveston, Houston & S. A. R. R. v. Le Gierse*, 51 Tex. 189; *Houston & Texas Central R. R. v. Leslie*, 57 Tex. 83.

³ *Dawson v. Boston & Maine R. R.*, 156 Mass. 127; *Schaefer v. St. Louis, &c. R. R.*, 128 Mo. 64.

⁴ *Cody v. New York & New England R. R.*, 151 Mass. 462, and see § 157, *ante*. Where the conductor of a train on an elevated railroad was absent from his post of duty on the platform of a car which, between stations, was kept closed against ingress or egress by a gate; and the train stopped at a station; and a passenger, wishing to leave the car at that station, opened the door of the car for the purpose of attracting the conductor's attention, and having opened the gate, was injured by the gate swinging against her hand; it was held that the question of her contributory negligence was for the jury. *Baker v. Manhattan Railway Co.*, 54 N. Y. S. C. 394.

did not amount to an invitation to the plaintiff to alight from a moving train, but from the train after it had stopped.¹ The earlier cases on this subject appeared to hold, as an absolute rule of law, that one could not recover for an injury received by reason of his leaving a railway train while it was in motion.² But the tendency of the later cases is to consider the question of negligence as one of fact, unless the conduct of the plaintiff was clearly so reckless as to leave no reasonable doubt that it was negligent.³ So it was held that the attempt to board a moving train was negligent unless there were special circumstances to excuse the act; but now it is considered that a well-founded belief on the part of the plaintiff that he may get upon the train safely may furnish an excuse for the act.⁴ But it is clear that it is as matter of law negligence to leave, without excuse, a rapidly moving train unless there are strong circum-

¹ *England v. Boston & Maine R. R.*, 153 Mass. 490. See *Bridges v. North London Railway*, L. R. 6 Q. B. 377; *Lewis v. London, Chatham & Dover Railway*, L. R. 9 Q. B. 66.

² See *Lucas v. New Bedford & Taunton R. R.*, 6 Gray, 64; *Bancroft v. Boston & Worcester R. R.*, 97 Mass. 275; *Forsyth v. Boston & Albany R. R.*, 103 Mass. 510; *Gavett v. Manchester & Lawrence R. R.*, 16 Gray, 501; *Morrison v. Erie R. R.*, 56 N. Y. 312; *Pennsylvania R. R. v. Aspell*, 23 Penn St. 147; *Lake Shore & Mich. Southern R. R. v. Bangs*, 47 Mich. 470; *Cumberland Valley R. R. v. Mangans*, 61 Md. 53; *Straus v. Kansas City, St. Jo. & C. R. R.*, 75 Mo. 585; *Schiffer v. Chic. & N. W. R. R.*, 96 Wis. 141; *Butler v. St. Paul & D. R. R.*, 59 Minn. 135; *McDonald v. Montgomery St. Railway*, 110 Ala. 161; *Hoehn v. Chic., P. & St. L. R. R.*, 152 Ill. 223; *Heaton v. Kansas City, P. & G. R. R.*, 65 Mo. App. 479; *Woolsey v. Chic., B. & Q. R. R.*, 39 Neb. 798, in which cases the rule has been more or less strictly applied.

³ See *Treat v. Boston & Lowell R. R.*, 131 Mass. 371; *Brooks v. Boston & Maine R. R.*, 135 Mass. 216; *Toledo, St. L. & C. R. R. v. Wingate*, 143 Ind. 125; *Birmingham El. R. R. v. Clay*, 108 Ala. 233; *Railroad v. Mitchell*, 98 Tenn. 27.

⁴ *Dawson v. Boston & Maine R. R.*, 156 Mass. 127. In *Gahagan v. Boston & Lowell R. R.*, 1 Allen, 187, it was held that an attempt to pass, without special reason, between cars in motion and propelled by a locomotive, was negligence *per se*, but it is apprehended that the question whether the plaintiff is negligent in such a case will depend upon the degree of the danger to which he voluntarily subjects himself, which in turn depends upon the construction of the cars between which he attempts to pass, the rate of speed at which the train is moving, etc.

stances of excuse or necessity for so doing.¹ It is obvious that in certain situations, as where a passenger perceives a collision with another train, or other serious accident, to be imminent, the prudent course may be for the passenger to jump from the train.² So, in an early case, where the want of proper skill or care of the driver of a stage-coach placed the passengers in peril, so that they had a reasonable ground for supposing that the stage would upset and that the driver was incompetent, it was held that a plaintiff passenger might recover, although the attempts of the plaintiff to escape from the coach might have increased the peril in which he was placed, and although he probably might have escaped without injury if he had remained in the coach.³ There is a line of cases which seem to hold, or intimate, that where the act of the passenger in attempting to board, or alight from, a moving train or car is done at the invitation or advice of the carrier or his servant, such act will not be negligence *per se*, whatever the circumstances of danger;⁴ but since the quality of the act, as negligent or otherwise, cannot be affected by the fact that the passenger was invited or incited to do it by a third person, it would seem that such a rule cannot be justified. Thus it has been held that a passenger is not justified in jumping from a train moving at the rate of from ten to fifteen miles an hour because a trainman tells him that he is on the wrong train, that it will

¹ *Phillips v. Rensselaer & Saratoga R. R.*, 49 N. Y. 177; *Harper v. Erie R. R.*, 32 N. J. L. 88; *Illinois Central R. R. v. Chambers*, 71 Ill. 519; *Richmond & Danville R. R. v. Morris*, 31 Gratt. 200; *Wabash, St. L. & Pac. R. R. v. Rector*, 104 Ill. 296; *Lake Shore & Mich. South. R. R. v. Bangs*, 47 Mich. 470; *Houston & Texas Central R. R. v. Leslie*, 57 Tex. 83; *McCorkle v. Chicago, R. I. & Pac. R. R.*, 61 Iowa, 555; *Nelson v. Atlantic & Pacific R. R.*, 68 Mo. 595; *Central R. R. & Banking Co. v. Letcher*, 69 Ala. 106; *Blodgett v. Bartlett*, 50 Ga. 353.

² *Cousins v. Lake Shore & M. S. R. R.*, 96 Mich. 306; *Odom v. St. Louis S. W. R. R.*, 45 La. Ann. 1201, and see *Conway v. Railroad*, 46 La. Ann. 1430.

³ *Stokes v. Saltonstall*, 13 Pet. 181, and see *Jones v. Boyce*, 1 Stark. 293.

⁴ See *Burgin v. Richmond & D. R. R.*, 115 N. C. 673; *Watkins v. Raleigh, &c. R. R.*, 116 N. C. 961; *Railway Co. v. Johnson*, 59 Ark. 122; *Distler v. Long Island R. R.*, 151 N. Y. 424; *Elphland v. Mo. Pac. R. R.*, 57 Mo. App. 147.

not stop to let him off, and that he can safely jump from it.¹ So it is negligence for a passenger to jump from a street car moving at the rate of twenty miles an hour; notwithstanding he is advised to jump by the conductor of the car, and the rate of speed is illegal.²

§ 159. **As to Passengers in Street Cars.** — Since the measure of care to be exacted of the passenger is to be proportioned to the circumstances of danger in which he is placed, it will be found that passengers on street cars will be held to a less stringent rule than is applied to the case of accidents occurring upon railways.³ Thus it is not, ordinarily, as matter of law, negligence to board a moving street car,⁴ nor to alight from it,⁵ nor to ride upon the platform,⁶ although it has been

¹ *Rothstein v. Penn. R. R.*, 171 Penn. St. 620.

² *Masterson v. Macon City R. R.*, 88 Ga. 436, and see *Atlanta R. R. v. Dickerson*, 89 Ga. 455. It is held that the fact that the conductor of a street railway car fails to give a passenger an opportunity to alight safely at a place at which the passenger has given him notice that he wishes to alight, and the passenger in stepping from the moving car at that place is injured, is a circumstance, merely, to be considered upon the question of the negligence, respectively, of the conductor and the passenger. *Robinson v. Northampton Street Railway*, 157 Mass. 224.

³ See *North Chicago Street Railway v. Williams*, 140 Ill. 275; *North Chicago Street Railway v. Wiswell*, 168 Ill. 613; *New Jersey Traction Co. v. Gardner*, 60 N. J. L. 571; § 157, *ante*.

⁴ *West Philadelphia Passenger Railway v. Gallagher*, 108 Penn. St. 524; *Thirteenth & Fourteenth Street Passenger R. R. v. Boudrou*, 92 Penn. St. 475; *Connor v. Citizens' Street R. R.*, 105 Ind. 62; *Bruce v. Union Railway*, 148 Mass. 72; *Gallagher v. West End Railway*, 156 Mass. 157; *Augusta R. R. v. Glover*, 92 Ga. 133. See *Linch v. Pittsburg Traction Co.*, 153 Penn. St. 102; *Ober v. Railroad Co.*, 44 La. Ann. 1060; *McLeod v. Graven*, 43 U. S. App. 129; *Baltimore Traction Co. v. State*, 78 Md. 409.

⁵ *Creamer v. West End R. R.*, 156 Mass. 320. It is held that the question whether it is negligence to eject a passenger from a street car in motion is for the jury, since the danger of doing this must depend upon circumstances, particularly the rate at which the car is moving. *Murphy v. Union Railway*, 118 Mass. 228. But see *Sanford v. Eighth Avenue R. R.*, 23 N. Y. 343; *Isaacs v. Third Avenue R. R.*, 47 N. Y. 122. If a

⁶ *Sheridan v. Brooklyn City, &c. R. R.*, 36 N. Y. 39; *Spooner v. Brooklyn City R. R.*, 54 N. Y. 230; *Nolan v. Brooklyn City R. R.*, 87 N. Y.

held that if the passenger's attention was directed to a notice posted on the car, prohibiting such riding, this would be contributory negligence.¹ But it is apprehended that, in order to prevent a recovery in such a case, it must appear that the violation of the rule directly contributed to cause the injury complained of.² Where a passenger in a street car was sitting with his arm projecting from the window of the car, and it was injured by an obstruction on the outside, negligently placed there by the defendant, it was held that the passenger was not, as matter of law, debarred from a recovery.³ A street railway company, having no control over the street, is not an insurer of any place at which it stops a car for a passenger to alight, having exercised proper care in selecting a place to stop.⁴

passenger voluntarily alights from a street car in motion he takes the risk of injury by the sudden starting up of the car, and the employees who so start the car are not negligent if they are ignorant that the passenger is so alighting. *Nichols v. Middlesex R. R.*, 106 Mass. 463.

63; *Lehr v. Steinway & Hunter's Point R. R.*, 118 N. Y. 556; *Fleck v. Union Railway Co.*, 134 Mass. 480; *Meesel v. Lynn & Boston R. R.*, 8 Allen, 234; *Graham v. Manhattan Railway*, 149 N. Y. 336; *Reber v. Pitts. Traction Co.*, 179 Penn. St. 339; *Highland R. R. v. Donovan*, 94 Ala. 299; *Noble v. St. Joseph Railway*, 98 Mich. 249; *Matz v. St. Paul City Railway*, 52 Minn. 159. But one who voluntarily rides on the platform of a street car takes the risk of being injured by ordinary jolting, *Hayes v. Forty Second St. & C. R. R.*, 97 N. Y. 259; and see *Beal v. Lowell & Dracut Street Railway Co.*, 157 Mass. 444. Standing on the bumper of a street car, although the car and platform of the car are filled to overflowing, is *per se* negligence, *Bard v. Penn. Traction Co.*, 176 Penn. St. 97, and so is sitting on the driver's high seat on the front platform, without invitation. *Mann v. Philadelphia Traction Co.*, 175 Penn. St. 123.

¹ *Wills v. Lynn & Boston R. R.*, 129 Mass. 351.

² See § 156, *ante*.

³ *Francis v. New York Steam Co.*, 114 N. Y. 380. See § 157, *ante*, and cases cited. The mere fact that a person who was injured by a collision between a street car and an ice-wagon, was standing on the platform of the car when there were seats to be obtained inside, is not a defence in an action brought by him against the owner of the ice-wagon, for the injury. *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104.

⁴ *Connolly v. Lewiston & A. Horse R. R.*, 87 Maine. 283. So it will not be responsible for injury received by a passenger who in alighting steps on a rolling stone in the street. *Ib.*

§ 160. **As to Passengers on Vessels.**—A cabin passenger, on board a passenger vessel, has a right of access to any part of the ship, suitable and intended for passengers, and he is not, as matter of law, bound to anticipate danger in such parts of the ship; as from a hawser on the deck used to warp the ship into her dock.¹ But if the passenger goes where he has no right to go, and so is injured, he is guilty of contributory negligence, and the owners of the ship will not be responsible unless the injury is caused by the wilful or wanton act of their servants. So where a passenger, without good excuse, left a steamboat by an exit which was intended only for freight, he knowing that a proper and sufficient exit for passengers had been provided in another place, and in so leaving was injured, it was held that the owners of the boat were not liable for the injury.² The same rule was held where a passenger attempted to leave a ferry-boat by the gangway provided for teams, instead of by that intended for passengers, and in so doing was injured.³ A passenger has a right to leave a steamer at the customary landings for his own convenience, and is entitled to the protection due a passenger while so doing.⁴

¹ *Miller v. Ocean Steamship Co.*, 118 N. Y. 199.

² *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 207.

³ *Graham v. Pennsylvania R. R.*, 39 Fed. Rep. 596. But where a ferry company is accustomed to bar the entrance to its boats by chains, and to remove these when it is safe for the passengers to proceed, a passenger is not necessarily negligent, who, knowing the custom, and relying on it, proceeds when the guard has, in fact, been removed too soon. *Ferris v. Union Ferry Co.*, 36 N. Y. 312. One who controls a ferry is to be charged with the duties of a carrier. See *Burton v. West Jersey Ferry Co.*, 114 U. S. 474; *Miles v. James*, 1 McCord, 157; *Bartlett v. New York & S. B. F. & H. Transportation Co.*, 25 J. & S. 348.

⁴ *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608; *Dice v. Wilamette Transportation & Locks Co.*, 8 Or. 60. See *Clussman v. Long Island R. R.*, 73 N. Y. 606; *Hrebrik v. Carr*, 29 Fed. Rep. 298.

SECTION VII.

AT RAILWAY CROSSINGS.

§ 161. **General Rule : Illustrations.** — It is a general rule that if a person enters upon a railway track at a crossing, whether public or private, without looking to see if a train or locomotive is approaching, and, not having any reasonable excuse for not looking, receives an injury, he is guilty of contributory negligence, and cannot recover damages for the injury.¹ But

¹ *Powell v. New York Central & H. R. R. R.*, 109 N. Y. 613; *Cullen v. Delaware & Hudson Canal Co.*, 113 N. Y. 667; *Brickell v. New York Central & H. R. R. R.*, 120 N. Y. 290; *Bomboy v. New York Central & H. R. R. R.*, 47 Hun, 425; *Woodward v. New York, L. E. & W. R. R.*, 106 N. Y. 369; *Mynning v. Detroit, L. & N. R. R.*, 67 Mich. 677; *Gebhard v. Detroit, G. H. & M. R. R.*, 44 N. W. Rep. 1045 (Mich. 1890); *Underhill v. Chicago & G. T. R. R.*, 81 Mich. 43; *State v. Maine Central R. R.*, 77 Maine, 538; *Chase v. Maine Central R. R.*, 78 Maine, 346; *Lesan v. Maine Central R. R.*, 77 Maine, 85; *Allen v. Maine Central R. R.*, 82 Maine, 111; *Butterfield v. Western R. R.*, 10 Allen, 532; *Allyn v. Boston & Albany R. R.*, 105 Mass. 77; *Wheelock v. Boston & Albany R. R.*, 105 Mass. 203; *Damrill v. St. Louis & S. F. R. R.*, 27 Mo. 202; *Neier v. Missouri Pacific R. R.*, 6 S. W. Rep. 695 (Mo. 1890); *Hudson v. Wabash W. R. R.*, 101 Mo. 13; *Union R. R. v. State*, 72 Md. 153; *Clark v. Missouri Pacific R. R.*, 35 Kan. 350; *Chicago, Milwaukee & St. P. R. R. v. Wilson*, 133 Ill. 55; *Brown v. Texas & Pacific R. R.*, 42 La. Ann. 350; *Nash v. Richmond & D. R. R.*, 82 Va. 55; *Butler v. Gettysburg & H. R. R.*, 126 Penn. St. 160; *Cincinnati, I. & St. L. R. R. v. Howard*, 124 Ind. 280; *Glascok v. Central Pacific R. R.*, 14 Pac. Rep. 518, Cal. 87; *McCroy v. Chicago, Milwaukee & St. P. R. R.*, 31 Fed. Rep. 531; *Marty v. Chicago, St. P., M. & O. R. R.*, 38 Minn. 108; *Miller v. Truesdale*, 56 Minn. 298; *Durbin v. Oregon Railway & Nav. Co.*, 17 Or. 5; *Continental Improvement Co. v. Stead*, 95 U. S. 161; *Schofield v. Chicago, Milwaukee & St. P. R. R.*, 114 U. S. 615; *Chicago, R. I. & Pac. R. R. v. Houston*, 95 U. S. 697; *New York, N. H. & H. R. R. v. Blessing*, 35 U. S. App. 208; *Pyle v. Clark*, 49 U. S. App. 260; *Chicago, R. I. & Pac. R. R. v. Pounds*, 49 U. S. App. 476; *Western Md. R. R. v. Kehoe*, 83 Md. 434; *Manley v. Del. & H. Canal Co.*, 69 Vt. 101; *Derk v. N. Central R. R.*, 168 Penn. St. 243; *Gangawer v. Phil. & R. R. R.*, 168 Penn. St. 265; *Plummer v. N. Y. & H. R. R.*, 168 Penn. St. 62; *Gray v. Penn. R. R.*, 172 Penn. St. 383; *Hughes v. Del. & H. Can. Co.*, 176 Penn. St. 254; *Del., L. & W. R. R. v. Hefferan*, 57 N. J. L. 149; *Nixon*

the rule is not invariable, and will not be applied when the circumstances were such as to afford the plaintiff a reasonable excuse for not looking;¹ and it may often be a question for the jury to determine whether the conduct of the defendant was in fact negligent.² So it is held that when a person, without fault of his own, whether on foot or driving, finds himself upon a railroad crossing exposed to danger from an approaching train, he is not bound to exercise the utmost conceivable prudence; and the question whether he exercised due care in going forward or turning back is generally for the jury.³ So the failure to look for a train may be excusable under circumstances of confusion or danger; as where the

v. Chic., R. I. & Pac. R. R., 84 Iowa, 331; *Banning v. Chic., R. I. & Pac. R. R.*, 89 Iowa, 74; *Moore v. Keokuk & W. R. R.*, 89 Iowa, 223; *Indianapolis, D. & W. R. R. v. Wilson*, 134 Ind. 95; *Gardner v. Detroit, L. & N. R. R.*, 97 Mich. 240; *Houghton v. Chic. & G. T. R. R.*, 99 Mich. 308; *Jensen v. Mich. Cent. R. R.*, 102 Mich. 307; *Dawe v. Flint & P. M. R. R.*, 102 Mich. 176; *Flynn v. Eastern R. R.*, 83 Wis. 631; *Schomlze v. Chic., M. & St. P. R. R.*, 83 Wis. 659; *Sclimgen v. Chic., M. & St. P. R. R.*, 90 Wis. 186; *Nolan v. Milwaukee, L. S. & W. R. R.*, 91 Wis. 6; *Lenz v. Whitcomb*, 96 Wis. 310; *Turner v. Hann. & St. Jo. R. R.*, 74 Mo. 602; *St. Louis, &c. R. R. v. Martin*, 61 Ark. 549; *Gilmore v. Cape Fear & Y. V. R. R.*, 115 N. C. 657; *Herlisch v. Louisville, N. O. & T. R. R.*, 44 La. Ann. 280; *Wright v. Cincinnati & C. R. R.*, 94 Ky. 114. But see *International & G. N. R. R. v. Dyer*, 76 Tex. 156; *Gulf, C. & S. F. R. R. v. Anderson*, 76 Tex. 244; *State v. Baltimore & Ohio R. R.*, 69 Md. 339.

¹ *Piper v. Chicago, Milwaukee & St. P. R. R.*, 77 Wis. 247; *Breckenfelder v. Lake Shore & Michigan So. R. R.*, 44 N. W. Rep. 957 (Mich. 1890); *Railroad v. Dies*, 98 Tenn. 655; *Struck v. Chic., M. & St. P. R. R.*, 58 Minn. 298.

² *Bare v. Pennsylvania R. R.*, 135 Penn. St. 95; *Fisher v. Monongahela Connecting R. R.*, 131 Penn. St. 292; *State v. Union R. R.*, 70 Md. 69; *McNeal v. Pittsburg & W. R. R.*, 131 Penn. St. 184; *Pennsylvania R. R. v. Wilson*, 132 Penn. St. 27; *St. Louis, I. M. & S. R. R. v. Box*, 52 Ark. 358; *Kane v. New York, N. H. & H. R. R.*, 9 N. Y. Sup. N. E. Rep. 879 (1890); *Roberts v. Del. & H. Can. Co.*, 177 Penn. St. 183; *Davidson v. Lake Shore & M. S. R. R.*, 179 Penn. St. 227; *Cookson v. Pitts. & W. R. R.*, 179 Penn. St. 184.

³ *Wasmer v. Delaware, Lackawanna & W. R. R.*, 80 N. Y. 212; *Beiseigel v. Delaware, L. & W. R. R.*, 80 N. Y. 218; *Greany v. Long Island R. R.*, 101 N. Y. 419; *Sherry v. New York Central & H. R. R. R.*, 104 N. Y. 652; *Donohue v. St. Louis, I. Mt. & S. R. R.*, 91 Mo. 357, and see *Cassida v. Oregon Railway & Nav. Co.*, 14 Or. 551.

traveller, being lawfully on the tracks, had his attention called to one of two approaching trains, and in avoiding it failed to look out for the other,¹ or where the traveller's team is running away, and the train does not give warning.² By the application of the rule stated, it is held to be contributory negligence to attempt to cross a railroad track in full view of a near and approaching train, moving rapidly.³ Whether crossing a track in front of a train is negligence may depend on circumstances;⁴ but when voluntarily done under dangerous conditions it is negligence *per se*.⁵ So it is negligence to fail to look when stepping upon a track where cars are being switched,⁶ or when walking beside the track, and too near it for safety,⁷ or to attempt to cross between standing cars without looking.⁸ The general rule was held not applicable where a train had passed a crossing while the injured person was within a few rods of it and driving at a trot, and had passed on out of his sight so as to induce the belief that it was to continue on its course in the same direction, and there was no reason to suppose that it would immediately return.⁹ So where the plaintiff on approaching a crossing saw a train pass, and supposing that another would not immediately follow,

¹ *Chicago, Rock Island & Pacific R. R. v. Dignan*, 56 Ill. 487. See also § 142, *ante*, notes and case cited.

² *Pratt v. Chic., R. I. & Pac. R. R.*, 98 Iowa, 563.

³ *Potter v. Flint & Pere Marquette R. R.*, 62 Mich. 22; *Collins v. Long Island R. R.*, 10 N. Y. Sup. N. E. Rep. 701; *Baltimore & Ohio R. R. v. Colvin*, 12 Atl. Rep. 537 (Penn. 1888); *Allen v. Pennsylvania R. R.*, 12 Atl. Rep. 493 (Penn. 1888); *Allerton v. Boston & Maine R. R.*, 146 Mass. 241; *Granger v. Boston & Albany R. R.*, 146 Mass. 276; *International & Great Northern R. R. v. Kuehn*, 70 Tex. 582; *Kelly v. Pennsylvania R. R.*, 8 Atl. Rep. 856 (Penn. 1887).

⁴ *Traders' & Travellers' Accident Co. v. Wagley*, 45 U. S. App. 39. But see *Int. & Gt. Northern R. R. v. Kuehn*, 2 Tex. Civ. App. 210; *Cleveland, C. C. & St. L. R. R. v. Baddeley*, 150 Ill. 328.

⁵ *Walker v. McLean*, 46 U. S. App. 150; *Irey v. Penn. R. R.*, 132 Penn. St. 563.

⁶ *Sabine & E. T. R. R. v. Dean*, 76 Tex. 73.

⁷ *Heffinger v. Minneapolis, M. & N. R. R.*, 43 Minn. 503.

⁸ *Bertelsen v. Chicago, M. & St. P. R. R.*, 40 N. W. Rep. 561 (Dak. 1888).

⁹ *Duame v. Chicago & Northwestern R. R.*, 72 Iowa, 227.

drove upon the track and was struck and injured by some cars which the defendant had purposely detached from the train that had passed, and which, without warning, followed the train over the crossing, it was held that the question of contributory negligence was for the jury.¹ Where the plaintiff had been informed that a certain train had passed, and so drove within thirty-five feet of the crossing without stopping to look and listen, when his horse took fright at the train and ran, thereby injuring him, it was held that the question of his contributory negligence was one of fact.² One who is driving on a road parallel to a railway track is not bound, as matter of law, to look for trains till he discovers a crossing.³ Driving rapidly upon the track without looking is negligence.⁴ Where the track was in plain view for a long distance, so that one exercising the slightest care could not have failed to see the approaching train, it was held by a divided court that the plaintiff, having been injured by a collision with the train, was guilty of contributory negligence.⁵ The general rule obtains although the defendant was guilty of violating some statutory regulation as to the running of its trains.⁶ The mere fact that a train is late, the plaintiff knowing or being bound to know that fact, will not excuse his failure to look and listen before

¹ *French v. Taunton Branch R. R.*, 116 Mass. 537; *Ward v. Chic.*, St. P. & C. R. R., 85 Wis. 301.

² *McCullough v. Minn.*, St. P. & C. R. R., 101 Mich. 234.

³ *Gulf, C. & S. F. R. R. v. Greenlee*, 70 Tex. 553.

⁴ *Cones v. Cincinnati, I.*, St. L. & C. R. R., 114 Ind. 328. It has been held that a bicycler must dismount on approaching a crossing, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen in the manner required of a pedestrian; a "bicycler's stop" by circling the bicycle outside the range of sight of the track is not a stop within the meaning of the rule. *Robertson v. Penn. R. R.*, 180 Penn. St. 43.

⁵ *Straugh v. Detroit, L. & N. R. R.*, 36 N. W. Rep. 161 (Mich. 1888). See, also, *Schilling v. Chicago, Milwaukee & St. Paul R. R.*, 71 Wis. 255, Taylor, J., dissenting; *Blaiser v. New York, L. E. & W. R. R.*, 110 N. Y. 638; *Bloomfield v. Burlington & Western R. R.*, 74 Iowa, 607; *Matti v. Chicago & W. Mich. R. R.*, 69 Mich. 109.

⁶ *Kwiatowski v. Chicago & Grand Trunk R. R.*, 70 Mich. 549; *Yancey v. Wabash, St. Louis & Pacific R. R.*, 93 Mo. 433. See § 112, *ante*, and cases cited.

crossing.¹ Where one approaching a crossing saw the headlight of the train when it was twenty-five feet distant from him, but, believing it to be stationary, did not stop to ascertain with certainty and continued to drive on, it was held that he was guilty of negligence, as matter of law.² One who attempts to pass between freight cars by climbing over the buffers was held to be, as matter of law, negligent, although the cars had been left standing for an unreasonable time across a public highway, and no engine was attached to them, or in sight.³ But where the defendant's railroad train extended several blocks along a public street in violation of law, and the plaintiff, lawfully using the street, attempted to cross between the cars and was injured; it was held that the blocking of the street by the defendant was the proximate cause of the injury, and that it was not, as matter of law, negligence for the plaintiff to attempt to cross, and that in so doing he was not a trespasser.⁴ One who, without right, enters upon the track of a railroad company, and remains there when he sees or ought to have seen an approaching train, by collision with which he is injured, is, as matter of law, guilty of contributory negligence.⁵ And so a person who, without looking, uses the track of a railroad as a highway, and is injured in so doing, cannot recover for such injury unless it appears that the company was guilty of wanton or wilful wrong in the premises.⁶ Persons with defective sight or hearing are bound to exercise special care on approaching a railway crossing.⁷

¹ Howard v. Northern Central R. R., 1 N. Y. Sup. N. E. Rep. 528 (1888).

² Ohio & M. R. R. v. Maisch, 29 Ill. App. 640.

³ Magoon v. Boston & Maine R. R., 67 Vt. 746.

⁴ Hudson v. Wabash Western R. R., 101 Mo. 13.

⁵ See Bouwmeester v. Grand Rapids & I. R. R., 67 Mich. 87; Little Rock & Fort Smith R. R. v. Caveness, 48 Ark. 106; Central Railroad & Banking Co. v. Smith, 78 Ga. 627; Hughes v. Galveston, H. & S. R. R., 67 Tex. 595; Texas & New Orleans R. R. v. Barfield, 3 S. W. Rep. 665 (Tex. 1887); Mobile & Ohio R. R. v. Stroud, 64 Miss. 784; Houston v. Vicksburg, S. & P. R. R., 39 La. Ann. 796; Brennan v. Del., L. & W. R. R., 53 U. S. App. 51; § 73, *ante*, notes and cases cited.

⁶ Roden v. Chicago & Grand Trunk R. R., 133 Ill. 72; St. Louis & S. F. R. R. v. Whittle, 40 U. S. App. 23.

⁷ McKinney v. Chic. & N. W. R. R., 87 Wis. 195; Beem v. Tama Electric Co., 104 Iowa, 653. See § 146, *ante*.

The servants of the railroad have a right to presume that a traveller approaching a crossing will look and listen.¹ Where one was killed by a collision at a railway crossing, it was held that the ordinary presumption that the deceased had exercised ordinary care for his own safety, was rebutted by the fact that, had he looked, he might have seen the train at a long distance.² So where the plaintiff's intestate was killed at a point on a railroad crossing where she could have had an unobstructed view, for a distance of nine hundred feet, in the direction from which the train was approaching, it was held that the action for death could not be maintained.³

§ 161 a. **Crossings of Street Railways.**—It appears to be held, generally, that there is no absolute rule of law that a person driving or walking along a street must look and listen for an approaching car before entering on the tracks of an electric railway. And a distinction is taken between the duty of the traveller under such circumstances and his duty to look and listen when approaching the crossing of a steam railway, which has an exclusive right of way over its roadbed. The fact that the power used by the street railway is electric, and not derived from horses, has not been deemed sufficient to make the rule applied concerning the crossing of a steam railway exactly applicable to a street railway.⁴ But there are

¹ *Cleveland, C., C. & St. L. R. R. v. Miller*, 149 Ind. 490.

² *Connerton v. Del. & H. Canal Co.*, 169 Penn. St. 339; *Holden v. Penn. R. R.*, 169 Penn. St. 1; and see *Seamans v. Del., L. & W. R. R.*, 174 Penn. St. 421; *Sullivan v. New York, L. E. & W. R. R.*, 175 Penn. St. 361; *State v. Maine Central R. R.*, 76 Maine, 357; *State v. Boston & Maine R. R.*, 80 Maine, 430; *Smith v. Maine Central R. R.*, 87 Maine, 339; *Haetsch v. Chic. & N. W. R. R.*, 87 Wis. 304; *Tobias v. Mich. Central R. R.*, 103 Mich. 330; *Smith v. Wabash R. R.*, 141 Ind. 92; the rule will be otherwise when the deceased could not have seen the train until it was nearly upon him. *Haverstick v. Penn. R. R.*, 171 Penn. St. 101.

³ *Lees v. Phil. & R. R. R.*, 154 Penn. St. 46, and see *Smith v. Phil. & R. R. R.*, 160 Penn. St. 117.

⁴ *Robbins v. Springfield Street Railway*, 165 Mass. 30; *Burhens v. Dry Dock, &c. Railway*, 53 Hun, 571; *Cons. Traction Co. v. Scott*, 58 N. J. L. 682; *Cons. Traction Co. v. Haight*, 59 N. J. L. 577; *Thatcher v. Cent. Traction Co.*, 166 Penn. St. 66; *Cincinnati Street Railway v. Snell*, 54

authorities that hold a contrary rule, considering that the duty of looking and listening before crossing the tracks of a steam railway is equally applicable as to the crossings of an electric street railway.¹ And it is clear that there may be circumstances which may make the crossing of a street railway in front of a car, negligence as matter of law, as where one persisted in such crossing, in spite of warnings.² It has been held that electric street-cars have, in a qualified way, the right of way, as against persons travelling on foot, or in carriages; in like manner as steam railways have; and that travellers are bound to leave such cars an unobstructed passage, in so far as this is possible.³ But it is said that this rule does not apply to streets crossing the railway; and that, at such crossings, the railway cars, and other vehicles, moving on the crossing, have equal rights;⁴ and it is held that the drivers and conductors of street railway cars, whatever the motive power, have, generally, the same rights and duties as to vehicles crossing their course that the drivers of such other vehicles have.⁵ One is not bound to refrain from crossing a street in front of a trolley car for fear that the motorman will not make use of the appliances provided to reduce speed. And it is the duty of the motorman to stop the car, if the person crossing apparently does not heed the ordinary signals.⁶

Ohio St. 197; *Baltimore Traction Co. v. Helms*, 84 Md. 515; *Shea v. St. Paul City Railway*, 50 Minn. 395.

¹ *McGee v. Consol. Street Railway*, 102 Mich. 107; and see *Fritz v. Detroit Street Railway*, 105 Mich. 50; *Blakeslee v. Consol. Street Railway*, 105 Mich. 462; *Boerth v. West Side R. R.*, 87 Wis. 288; *Smith v. Citizens Railway*, 52 Mo. App. 36.

² *Omslaer v. Pitts. Traction Co.*, 168 Penn. St. 519; *Schlater v. Wilbert*, 41 La. Ann. 406; *Highland Ave. R. R. v. Maddox*, 100 Ala. 618; *Hickey v. St. Paul City Railway*, 60 Minn. 119. See § 162, *post*.

³ *Flewelling v. Lewiston & A. R. R.*, 89 Maine, 585.

⁴ *O'Neill v. Dry Dock, &c. Co.*, 129 N. Y. 125. In some States, a right of way in favor of street railway cars is created by statute.

⁵ See *Driscoll v. West End Street Railway*, 159 Mass. 142; *Ellis v. Lynn & Boston R. R.*, 160 Mass. 341.

⁶ *Consolidated Traction Co. v. Lamson*, 59 N. J. L. 297. A person driving along a street which leads into but does not cross another street upon which an electric railway runs is not bound to cross over to the right hand side of that street in the direction in which he is going; but may

§ 162. **Invitations and Warnings.** — A person approaching a railway crossing with intent to pass it is not bound to anticipate negligence on the part of the railroad, and so has a right to expect that the customary signals and warnings will be given on the approach of a train.¹ So if the gate at the crossing is open, and the gateman is present in charge, the traveller has a right to take this as a notice that the track is clear and as an implied invitation to proceed, even at a trot, if he is driving.² The failure to close the gates, in such a case, is said to modify, to an extent, the duty of travellers on the highway approaching the crossing to look and listen; so that the question of contributory negligence on the part of the traveller will be one of fact for the jury.³ But the failure either to close the gates or to give the customary flag-signal, on the approach of a train, will not ordinarily relieve one approaching the crossing from the duty of looking to see if a train is approaching.⁴ Generally where the plaintiff attempts to cross in compliance with the advice or invitation, express or implied, of the servants of the railroad, the question of contributory neg-

use the left hand side unless and until he meets a vehicle coming in the opposite direction. *Galbraith v. West End Street Railway*, 165 Mass. 572. It is held that the persons operating a street railway car are bound to look and listen before crossing a steam railway. *New York, &c. R. R. v. N. J. Electric Co.*, 60 N. J. L. 52. See, *contra*, *Savannah Railway v. Beasley*, 94 Ga. 142.

¹ *Wichita & Western R. R. v. Davis*, 37 Kan. 743; *McNamara v. New York Cent. & H. R. R. R.*, 136 N. Y. 650; *Harper v. Barnard*, 99 Iowa, 159; *Balt. & Ohio R. R. v. Conoyer*, 149 Ind. 524; *Chicago & W. I. R. R. v. Ptacek*, 171 Ill. 9.

² *Cleveland, C., C. & I. R. R. v. Schneider*, 45 Ohio St. 678; *Manley v. Boston & Maine R. R.*, 159 Mass. 493.

³ *Blount v. Grand Trunk Railway*, 22 U. S. App. 129. See *Roberts v. Del. & H. Canal Co.*, 177 Penn. St. 183; *Omaha & R. V. R. R. v. Talbot*, 48 Neb. 628; *Missouri Pacific R. R. v. Geist*, 49 Neb. 489; *Russell v. Carolina Central R. R.*, 118 N. C. 1098.

⁴ *Tyler v. Old Colony R. R.*, 157 Mass. 336; *Ellis v. Boston & Maine R. R.*, 169 Mass. 600. See *Scaggs v. Del. & H. Canal Co.*, 145 N. Y. 201; *Blackwell v. St. Louis, I. M. & S. R. R.*, 47 La. Ann. 268; *Marks v. Petersburg R. R.*, 88 Va. 1; *Hogan v. Tyler*, 90 Va. 19; *Johnson v. Ches. & Ohio R. R.*, 91 Va. 171; *Atlantic & Danville R. R. v. Redger*, 95 Va. 418; *Jobe v. Memphis & C. R. R.*, 71 Miss. 734; *Miller v. Terre Haute, &c. R. R.*, 144 Ind. 323; *Threlkeld v. Wabash R. R.*, 68 Mo. App. 127.

ligence will be for the jury.¹ But if the act advised or invited to be done be manifestly dangerous, the mere fact that it was incited by the defendant will not be an excuse.² The mere fact that a warning was uttered to the plaintiff will not be sufficient to charge him with negligence, unless it also appear that he comprehended the warning.³ But if the plaintiff hears and understands the warning, or if the circumstances were such that he must be taken to have heard and understood it, he will be guilty of contributory negligence if he attempts to cross.⁴

§ 163. **View of Crossing obstructed.**—If the view of the crossing is so obstructed, as by standing cars, that looking for the approach of the train would be useless, it seems that the plaintiff is not therefore obliged to desist from crossing,⁵ and so when the view is obscured by thick weather,⁶ or by darkness.⁷ And it is said that if he approaches such a crossing in a vehicle he is not bound to get down and go to a point where he can get an unobstructed view of the track, especially if he has a right to rely on the approach of trains being sig-

¹ *Doyle v. Boston & Albany R. R.*, 145 Mass. 386; *Warren v. Boston & Maine R. R.*, 163 Mass. 484; *Pennsylvania R. R. v. Horst*, 110 Penn. St. 226.

² Thus where a man and his wife, each about sixty years of age, at the suggestion of an employee of the railroad, attempted to climb over a train of freight cars standing at a station, it was held that they were guilty of contributory negligence. *Howard v. Kansas City, Fort Smith & G. R. R.*, 41 Kan. 403. One who, standing on a railway track, turns his back to a moving train merely to satisfy his curiosity cannot rely on a custom as to the movement of trains, which, if observed, would have rendered his action safe. *Collins v. Burlington, C. R. & N. R. R.*, 83 Iowa, 346.

³ *Union R. R. v. State*, 72 Md. 153.

⁴ *Allerton v. Boston & Maine R. R.*, 146 Mass. 241; *Granger v. Boston & Albany R. R.*, 146 Mass. 276; *Allen v. Pennsylvania R. R.*, 12 Atl. Rep. 493 (Penn. 1888); *International & Great Northern R. R. v. Kuehn*, 70 Tex. 582.

⁵ *Norfolk & Western R. R. v. Burge*, 4 S. E. Rep. 21 (Va. 1887); *Enders v. Lake Shore & M. S. R. R.*, 2 N. Y. Sup. N. E. Rep. 719 (N. Y. 1888); *Hughes v. Chic., St. P. & K. C. R. R.*, 88 Iowa, 404; *Chicago & Northwestern R. R. v. Hansen*, 166 Ill. 623.

⁶ *Valin v. Milwaukee & N. R. R.*, 82 Wis. 1.

⁷ *Van Auken v. Chic. & W. M. R. R.*, 96 Mich. 307.

nalled at that point.¹ But if the crossing is particularly or notoriously dangerous, as being so noisy that it is impossible for one approaching it in a vehicle to hear the signals or noise of approaching trains, it is contributory negligence to proceed over the crossing without stopping to listen. So where the view of the track was obstructed by standing cars, and the plaintiff did not stop to see whether a train which he knew to be due was approaching, and it did not appear that he had a right to expect that the approach of trains would be signalled at that point, it was held that he was guilty of contributory negligence in proceeding over the crossing.² And where a crossing was so overgrown with weeds as to obscure the view of the track to a person approaching it in a wagon, but he might have seen the track by rising to his feet, and there was a strong wind blowing which deadened the sound of the approaching train; the conduct of the plaintiff in driving over the crossing without rising to look for the train was held to be negligent.³ It has been held to be the duty of one driving, on approaching a crossing, not only to look and listen, but to stop his wagon and listen;⁴ and so as to a traveller on foot.⁵ The fact that the view is obscured in one direction will not excuse the failure to look in the direction in which the view is clear.⁶ If the obstruction of the view of the crossing

¹ *Guggenheim v. Lake Shore & Mich. Southern R. R.*, 66 Mich. 150; *Huckshold v. St. Louis, Iron Mt. & S. R. R.*, 90 Mo. 548; *Pearce v. Humphreys*, 34 Fed. Rep. 282, and see *Mackay v. New York Central R. R.*, 35 N. Y. 75; *Davis v. New York Central & H. R. R.*, 47 N. Y. 400; *Durbin v. Oregon Railway & Nav. Co.*, 17 Or. 5; and *contra*, *Pennsylvania R. R. v. Beale*, 73 Penn. St. 504; *North Pennsylvania R. R. v. Heileman*, 49 Penn. St. 60. The Pennsylvania cases have held that it is, as matter of law, the duty of a person driving and approaching a railroad crossing to alight and lead his horse over the crossing, see *Pennsylvania R. R. v. Beale*, *supra*; but these cases are disapproved in *Pearce v. Humphreys*, 34 Fed. Rep. 282, 285.

² *Donnelly v. Boston & Maine R. R.*, 151 Mass. 210.

³ *Missouri Pacific R. R. v. Lee*, 70 Tex. 496.

⁴ *Brady v. Toledo, Ann Arbor & N. M. R. R.*, 45 N. W. Rep. 1110 (Mich. 1890.).

⁵ *Pearce v. Humphreys*, 34 Fed. Rep. 282.

⁶ *Owens v. Pennsylvania R. R.*, 41 Fed. Rep. 187; *Guta v. Lake Shore & Mich. So. R. R.*, 81 Mich. 291.

is but temporary, as by the smoke of a train, or by a train passing the crossing, it is the duty of the traveller to wait till the temporary obstruction to his vision is removed. "The law lays it down clearly that a man must look and listen. And if by looking and listening he could ascertain the approach of a train and failed to do so, he is guilty of contributory negligence and cannot recover."¹

SECTION VIII.

OF TRAVELLERS ON HIGHWAYS.

§ 164. **General Rule applied : Safety of Way assumed.** — "It had been originally made a question whether he who incumbers the highway unlawfully should not be made answerable for any direct damage which happened to any one who was injured thereby ; whether the person thus injured was in the use of proper care or not ; and this doctrine was supposed to receive some countenance from Buller's *Nisi Prius*, 26."²

¹ *McCrory v. Chicago, Milwaukee & St. P. R. R.*, 31 Fed. Rep. 531 ; and see *Marty v. Chicago, St. Paul, M. & O. R. R.*, 38 Minn. 108 ; *Cincinnati, H. & I. R. R. v. Butler*, 103 Ind. 31 ; *Heaney v. Long Island R. R.*, 112 N. Y. 122 ; *Greenwood v. Philadelphia, W. & B. R. R.*, 124 Penn. St. 572 ; *Chase v. Maine Central R. R.*, 78 Maine, 346 ; *Granger v. Boston & Albany R. R.*, 146 Mass. 241 ; *Fletcher v. Fitchburg R. R.*, 149 Mass. 127. But in a case in Massachusetts, it appeared that the wagon in which was the plaintiff and another person driving was being slowly driven along the highway ; that they did not know that they had arrived at the railway crossing, nor see nor hear the engine or cars ; that there was no sign-board at the crossing ; that the train was moving at the rate of thirty miles an hour ; and that the whistle was not sounded or the bell rung before reaching the crossing. It did not appear that the approaching train was visible from the highway. It was held that on these facts the jury would be justified in finding that the plaintiff, a boy of ten years, was in the exercise of due care, and that the further facts that the plaintiff had his ears tied up, it being a cold day in winter, that he had previous knowledge that the railroad crossed the highway at the place of the accident, that he did not tell his companion of it, nor look nor listen for the train, were not conclusive against his right to recover. *Elkins v. Boston & Albany R. R.*, 115 Mass. 190.

² *Palmer v. Andover*, 2 Cush. 600, 605.

But it is now settled that, in such a case, "two things must concur to support the action; an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."¹ But, by ordinary care is intended ordinary prudence which does not require the traveller to look far ahead for obstructions which ought not to be suffered to exist.² And so it is a general rule that a traveller has a right to assume the safety of a public way or sidewalk, and is not bound to be on the lookout for special danger therein,³ whether by day or night.⁴ So the traveller has a right to expect that abutters maintaining openings in the sidewalk will keep these in a safe condition.⁵

§ 165. **Knowledge of Defect.** — Since the use of a public highway is a matter of right, and generally of necessity, it is held uniformly, that the mere fact that a traveller walks or drives upon a sidewalk or roadway, knowing it to be defective,

¹ Per Lord Ellenborough in *Butterfield v. Forrester*, 11 East, 60. The application of this rule would seem to be limited to cases in which the act of the defendant in creating the obstruction is not wantonly malicious.

² *Thompson v. Bridgewater*, 7 Pick. 188; *Palmer v. Andover*, 2 Cush. 600.

³ *Jennings v. Van Schaick*, 108 N. Y. 530; *Buck v. Biddeford*, 82 Maine, 433; *Lindsey v. Des Moines*, 74 Iowa, 111; *Osborne v. Detroit*, 32 Fed. Rep. 36; *Houston v. Isaacs*, 68 Tex. 116; *Gordon v. Richmond*, 83 Va. 436; *Barry v. Terkildsen*, 72 Cal. 254; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658; *Chicago v. Babcock*, 143 Ill. 358; *McCormick v. Monroe*, 64 Mo. App. 197; *Birmingham v. Tayloe*, 105 Ala. 170.

⁴ *Owen v. Fort Dodge*, 98 Iowa, 281; *Gutkind v. Elroy*, 97 Wis. 647.

⁵ *Wells v. Sibley*, 31 N. Y. Sup. N. E. Rep. 40 (1890); *McGuire v. Spence*, 91 N. Y. 303; *Turner v. Newburgh*, 109 N. Y. 301; *Howard County v. Legg*, 110 Ind. 479. It is not negligence, *per se* to run along a sidewalk in the dark. *Shenandoah v. Erdman*, 11 Cent. Rep. 440 (Penn. 1888). One who drives at a trot on a street upon a dark night within four or five feet of a red light seen by him at several rods distant and displayed as a warning of an excavation in the street is guilty of contributory negligence. *Smith v. Jackson*, 106 Mich. 136. Where a plaintiff, while walking on an ice-covered sidewalk, and holding to a fence, let go his hold on meeting another person, and in stepping to the right slipped and fell and was injured, it was held that the question whether he was guilty of contributory negligence was for the jury. *Fox v. Fort Edward*, 48 Hun, 363. See §§ 181-183, *post*, notes and cases cited.

is not, as matter of law, conclusive that he is negligent, although this may be a weighty circumstance in determining the issue as one of fact.¹ But one who ventures into a dangerous road, knowing its condition, is bound to exercise a degree of care proportionate to the danger. Thus where the plaintiff was injured by falling into a trench in a sidewalk, and it appeared that she had seen the trench almost daily, and had passed over it shortly before the accident, and that when the accident happened, her attention had been diverted from the trench, it was held that she was guilty of contributory negligence.² And it is clear that the general rule will not be applied if the way is so obviously dangerous that any reasonable man must have known that it could not be traversed without certain and serious injury. Thus, it was held that one who walked, in the dark, through a street which he knew to be obstructed and dangerous, there being no danger

¹ *Kelley v. Fond du Lac*, 31 Wis. 179; *Kenworthy v. Ironton*, 41 Wis. 647; *Bly v. Whitehall*, 120 N. Y. 506; *Harris v. Clinton*, 64 Mich. 447; *Davis v. Guilford*, 55 Conn. 351; *Moore v. Huntington*, 31 W. Va. 842; *Philadelphia v. Smith*, 23 W. N. C. 242; *Scranton v. Gore*, 124 Penn. St. 595; *Shaw v. Philadelphia*, 159 Penn. St. 457 (but see *Winner v. Oakland*, 158 Penn. St. 405); *Ellis v. Peru*, 23 Ill. App. 25; *Simonds v. Baraboo*, 93 Wis. 40; *Bouga v. Weare*, 109 Mich. 520; *Lowell v. Watertown*, 58 Mich. 565; *Sias v. Reed City*, 103 Mich. 312; *Sandwich v. Dolan*, 141 Ill. 430; *Hazard v. Council Bluffs*, 87 Iowa, 51; *Maloy v. St Paul*, 54 Minn. 398; *Fort Wayne v. Breese*, 123 Ind. 58; *Langan v. Atchison*, 35 Kan. 318; *Huntington v. Breen*, 77 Ind. 29; *Murphy v. Indianapolis*, 83 Ind. 76; *Richmond v. Mulholland*, 116 Ind. 173; *Witman v. Elkhart*, 122 Ind. 538; *Bedford v. Neal*, 143 Ind. 425; *Hampson v. Taylor*, 15 R. I. 83; *Graney v. St. Louis*, 141 Mo. 180; *Chilton v. St. Joseph*, 143 Mo. 192; *Birmingham v. Starr*, 112 Ala. 88.

² *Kelly v. Doody*, 116 N. Y. 275; and see *Alline v. Mars*, 71 Iowa, 654; *Walker v. Reidsville*, 96 N. C. 382; *Moore v. Richmond*, 85 Va. 538. A like rule was held where the plaintiff walked off the end of a sidewalk without looking, she knowing its condition. *Plymouth v. Milner*, 117 Ind. 324, and see *King v. Thompson*, 87 Penn. St. 365; *Barnes v. Sowden*, 119 Penn. St. 53; *Fee v. Columbus*, 168 Penn. St. 86; *Russell v. Monroe*, 116 N. C. 124. On the other hand, it has been held that walking into an opening in a sidewalk in broad daylight is not conclusive proof of negligence. *Cantwell v. Appleton*, 71 Wis. 463; *O'Reilly v. Sing Sing*, 1 N. Y. Sup. N. E. Rep. 582; *Scranton v. Gore*, 124 Penn. St. 595, and see *Tift v. Jones*, 77 Ga. 181.

signals to mark the obstructions, was negligent.¹ So the mere fact that a person is aware that snow or ice has accumulated upon a place over or upon which he has a right to pass is not conclusive evidence of want of due care on his part, in entering on such place,² even although it appears that the person did not think about the ice when entering upon the dangerous place, his mind being occupied with the business in which he was engaged.³ So one falling upon ice on a sidewalk is not necessarily guilty of contributory negligence because he had seen and avoided the ice three days before.⁴ And, generally the mere fact that a traveller in a highway perceive that an obstacle therein is dangerous to persons attempting to pass by it, will not be conclusive that he is guilty of contributory negligence in attempting to pass it.⁵ So although a traveller may know that a bridge is unsafe, yet if he knows that the public use it and uses due care in crossing it, he is not to be charged with negligence.⁶ It has been held, where there were two roads, by either of which the plaintiff might have reached his destination, that it was a question of

¹ *Hesser v. Grafton*, 33 W. Va. 548. It was held not to be contributory negligence to turn into an unimproved street in the night-time at a place other than the regular crossing. *Collins v. Dodge*, 35 N. W. Rep. 368 (Minn. 1887). For cases in which plaintiffs were injured as the result of their own carelessness in attempting to cross the draw of a bridge at an improper time, see *Splittorf v. State*, 108 N. Y. 205; *Muhr v. New York*, 2 N. Y. Sup. N. E. Rep. 59 (1888). Where one stumbled upon a plank nailed to a bridge, because he failed to look to see that the bridge was level, he knowing that similar planks were nailed upon other bridges in the neighborhood, it was held that he was guilty of contributory negligence. *Peetz v. St. Charles St. R. R.*, 42 La. Ann. 541. See *Seger v. Barkhampstead*, 22 Conn. 290.

² *Dewire v. Bailey*, 131 Mass. 169. See §§ 181-183, *post*, and cases cited.

³ *Watkins v. Goodall*, 138 Mass. 533.

⁴ *Thomas v. Mayor of New York*, 15 N. Y. Weekly Dig. 378.

⁵ *Mahoney v. Metropolitan R. R.*, 104 Mass. 73.

⁶ *Sheridan v. Palmyra*, 180 Penn. St. 439; *Waud v. Polk County*, 88 Iowa, 617. So, where one drove a blind horse over a defective bridge, it was held that the question of his contributory negligence was for the jury. *Heisey v. Rapho*, 181 Penn. St. 561. In *Cohea v. Coffeerville*, 69 Miss. 561, it was held that attempting to cross a bridge known to be dangerous was negligence, *per se*.

fact whether the plaintiff was negligent in choosing one rather than the other,¹ and so that a traveller, knowing a sidewalk to be defective on one side of the way but good on the other, was not negligent, *per se*, in taking the defective side.² But it was held that driving upon a bridge, knowing it to be unsafe, when a safe and convenient passage around it was provided, was contributory negligence.³ And so where the traveller unnecessarily stepped over a cavity in a street, left by the lawful removal of a flagstone, there being a safe passage provided around the cavity.⁴ And a like rule is held as to a highway out of repair or obstructed, a safe way, equally convenient, being provided for the traveller.⁵

§ 166. **Looking out for other Travellers: Driving.** — A traveller on the highway is bound to the exercise of ordinary and reasonable care to avoid injury by coming in contact with vehicles or with other passengers.⁶ It is held that a traveller on foot is not bound to look back, or listen, for the coming of another;⁷ nor to make sure that vehicles are not approaching him from behind, the street not being crowded with vehicles.⁸ But if a plaintiff has seen a vehicle approaching him on the highway, and by reason of his failure to watch it is run over

¹ *Mechesney v. Unity*, 164 Penn. St. 358, and see *Douglass v. Monongahela Water Co.*, 172 Penn. St. 435; *Nichols v. Laurens*, 96 Iowa, 388.

² *Taylor v. Springfield*, 61 Mo. App. 263.

³ *Noman v. Franklin County*, 90 Iowa, 185.

⁴ *Whalen v. Citizens Gas Light Co.*, 151 N. Y. 70.

⁵ *Ball v. El Paso*, 5 Tex. Civ. App. 221.

⁶ Whoever drives horses along the streets of a city is bound to anticipate that travellers on foot may be at the crossings and must take reasonable care not to injure them, *Murphy v. Orr*, 96 N. Y. 14; and as a foot-passenger has a right to cross the street at any point, the driver is bound to be watchful at all points as well as at the crossings. *Moebus v. Hermann*, 108 N. Y. 349. See *Lockhart v. Lichtenthaler*, 46 Penn. St. 151.

⁷ *Wiel v. Wright*, 8 N. Y. Sup. N. E. Rep. 776 (1890).

⁸ *Undejem v. Hastings*, 38 Minn. 485. So where a woman crossing a public street on flagstones laid for the purpose was injured by a passing horse and wagon, it was held that the fact that before attempting to cross, and while crossing, she did not look up or down the street but straight ahead, was not conclusive evidence of want of care on her part. *Shapleigh v. Wyman*, 134 Mass. 118.

and injured, he may be guilty of contributory negligence.¹ And a person who is injured by a carelessly driven vehicle while he is standing in the roadway engaged in conversation, after nightfall, cannot recover for his injuries from the driver of the vehicle, unless it appears that the latter was wantonly and maliciously careless in driving over the plaintiff.² It is held not to be, as matter of law, negligent, to drive a blind horse,³ nor to drive a horse which has been in the habit of running away, and which was running away at the time of the accident.⁴ It is the duty of the driver of a vehicle to keep in the travelled roadway, and if he fail to do this, without excuse, he may be guilty of contributory negligence.⁵ If the traveller exercises reasonable care in the selection of his horse, vehicle, harness, and other equipage, this is all that is required of him, and he will not be chargeable with negligence if a defect in his equipage concurs with another cause to produce the accident.⁶ It is not negligence, *per se*, to drive at a rapid gait, even in the streets of a city, and the fact that the traveller so driving violates an ordinance against fast driving, is evidence, only, upon the issue of his contributory negligence;⁷ and so is the fact that he was driving in violation of

¹ *Chisholm v. Knickerbocker Ice Co.*, 1 N. Y. Sup. N. E. Rep. 743 (1888).

² *Evans v. Adams Express Co.*, 122 Ind. 362.

³ *Brackenridge v. Fitchburg*, 145 Mass. 160; *Wright v. Templeton*, 132 Mass. 49; *Daniels v. Lebanon*, 58 N. H. 284; *Crocker v. Knickerbocker Ice Co.*, 92 N. Y. 652; *Heisey v. Rapho*, 181 Penn. St. 561.

⁴ *Centralia v. Scott*, 59 Ill. 129. It is not contributory negligence on the part of a father to send his two sons on an errand which makes it necessary to cross a railroad track, with a team of horses, at a crossing which they were accustomed to use, the horses being gentle. *Illinois Central R. R. v. Slater*, 28 Ill. App. 73, 129 Ill. 91.

⁵ *Ham v. Troy & Sandlake Turnpike Co.*, 6 N. Y. Sup. N. E. Rep. 593 (1889); *Kuhn v. Walker*, 97 Mich. 307.

⁶ *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, 44 N. H. 317; *Noyes v. Boscawen*, 64 N. H. 361.

⁷ *Jetter v. New York Central & Hudson River R. R.*, 2 Abb. App. Cas. 458; *Wright v. Malden & Melrose R. R.*, 4 Allen, 283; *Hall v. Ripley*, 119 Mass. 135; *Hanlon v. South Boston R. R.*, 129 Mass. 310; *Austin v. Ritz*, 72 Tex. 391. See § 112. But it is held that racing along a highway is in itself such an act of negligence as to make the parties racing liable for a collision occasioned thereby. *Potter v. Moran*, 61 Mich. 60; *Mittlestadt*

the law of the road.¹ A traveller, driving, has the right to use street car tracks; and he is not necessarily negligent in turning, to the left, from one track on to another parallel track.² And while it is his duty not unnecessarily to obstruct the track of a trolley car, the question whether he is guilty of negligence in so doing is one of fact.³ It has been held that if the traveller contributes to cause the accident by driving a horse which he knows to be vicious, or by driving with one hand disabled so as to interfere with the proper management of his horses, he is, as matter of law, guilty of contributory negligence;⁴ but it would seem that the question must, ordinarily, be one of fact. Thus it was held a question for the jury whether driving at night, without lights, it being too dark to distinguish the highway, was contributory negligence.⁵ A bicycle is a vehicle, and is to be so regarded in determining the degree of care to which the rider should be held in the use of the public highways.⁶ Riding a bicycle at a high rate of speed in the centre of a highway is not negligence *per se*.⁷

v. Morrison, 76 Wis. 265; *Cotterill v. Starkey*, 8 C. & P. 691, n. b; *Eaton v. Cripps*, 94 Iowa, 176. A pedestrian has the right to assume that ordinances regulating the speed at which teams may be driven will be observed. *Sandifer v. Lynn*, 52 Mo. App. 553.

¹ *Spofford v. Harlow*, 3 Allen, 176; *Wrinne v. Jones*, 111 Mass. 380; *Kidder v. Dunstable*, 11 Gray, 342; *Damon v. Scituate*, 119 Mass. 66; *Tuttle v. Lawrence*, 119 Mass. 276; *Smith v. Conway*, 121 Mass. 216; *Randolph v. O'Riordan*, 155 Mass. 331; *Meservey v. Lockett*, 161 Mass. 332.

² *Cons. Traction Co. v. Reeves*, 58 N. J. L. 573.

³ *Camden, &c. Railway v. Preston*, 59 N. J. L. 264. Whether the propulsion of a street railway car, painted a conspicuously bright color, along a public street, thereby causing fright to a horse with injury resulting therefrom, constitutes negligence, *quære*. *Cons. Traction Co. v. Behr*, 59 N. J. L. 477.

⁴ *Stringer v. Frost*, 116 Ind. 477; *Baltimore & L. Turnpike Co. v. Caswell*, 66 Md. 419; *Hall v. Huber*, 61 Mo. App. 384.

⁵ *Daniels v. Lebanon*, 58 N. H. 284.

⁶ *Myers v. Hinds*, 110 Mich. 300. See *Holland v. Bartch*, 120 Ind. 46; *Mercer v. Corbin*, 117 Ind. 450; *Taylor v. Goodwin*, 4 Q. B. D. 228.

⁷ *Holland v. Bartch*, 120 Ind. 46. But a skilled bicycle rider riding on the line of an electric railway in advance of a moving car, without heeding signals or looking behind him, is guilty of contributory negligence. *Everett v. Los Angeles, &c. Railway*, 115 Cal. 105.

CHAPTER VI.

STATUTORY LIABILITY OF MUNICIPALITIES AS TO WAYS.

SECTION I.

PRINCIPLES APPLIED.

§ 167. **No Liability at Common Law.** — While a private corporation, being created for its own benefit, stands on the same ground, as to its liability to be sued at common law, as an individual, quasi corporations, like counties, towns, or townships, being created by the legislature for purposes of public policy, cannot be sued in a private action for a breach of public duty, unless the right of action be given by the statute.¹ The authorities are divided upon the question whether a like rule applies as to municipalities, like cities or incorporated villages, which are created by special charter, and this question has been discussed fully in another place.² But in either case, the liability is statutory, arising when the corporation neglects or omits to perform a duty imposed on all like corporations, or on the defendant corporation by the express terms of, or by implication from, its charter, for the public benefit, safety, or convenience. Such a liability is that imposed upon municipalities to maintain and keep safe for

¹ *Russell v. Men of Devon*, 2 T. R. 667; *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 187; *Mower v. Leicester*, 9 Mass. 247. This rule does not apply to the case of the neglect of the obligations which a municipality incurs when a special duty is imposed upon it, with its consent express or implied, from which it derives a special benefit, or when a special authority is conferred upon it at its own request. *Eastman v. Meredith*, 36 N. H. 295; *Conrad v. Ithaca*, 16 N. Y. 295; and see § 58, *ante*, and cases cited.

² See §§ 53, 54, *ante*.

travellers, roads, streets, bridges, and public ways, and the statute law generally provides that if, by the breach of such duty, any traveller, being himself in the exercise of due care, suffers injury, the municipality shall be liable in damages therefor.¹ The liability attaches when the municipality is charged with the duty and invested with the power of keeping its ways in repair.² At common law, there is no duty imposed on a municipality, or on an abutter on a public way to maintain sidewalks thereon,³ but where the municipality is granted the power to establish the width, grade, and materials of sidewalks, and to cause them to be constructed and repaired by the abutting owners, or to construct and repair them and assess and enforce the costs against the abutting owners, it is liable for an injury caused by neglect to keep them in repair.⁴ But a municipality is not liable for

¹ *Bigelow v. Randolph*, 14 Gray, 540. At common law, a town is liable to indictment for the insufficiency of its roads and bridges, if negligence on the part of the town be proved, but not otherwise. See *Mower v. Leicester*, 9 Mass. 247. It has been said that in order to render a municipality liable for injuries caused by a defect in a highway, such defect must be such as is an indictable nuisance, see *Studley v. Oshkosh*, 45 Wis. 380; *Chicago v. Langlass*, 66 Ill. 361; *Furnell v. St. Paul*, 20 Minn. 117; *Barnes v. Newton*, 46 Iowa, 567; *Atlanta v. Perdue*, 58 Ga. 607; but it is apprehended that, as the liability, in each jurisdiction, depends upon the construction of the local statute, this expression is not to be accepted as embodying a general rule of law. The Public Statutes of Massachusetts, c. 52, § 18, provide that a city or town shall not be liable in the case of an injury from a defect in a way, unless the defect could have been remedied by the exercise on its part of reasonable care and diligence. This statute does not change the rule of law as to what constitutes reasonable care and diligence. *Blessington v. Boston*, 153 Mass. 409. A municipality is liable for an injury caused by a fall from a defective bridge to a street below, although the bridge is on the right of way of a railroad company whose duty it is to keep it in repair. *Fowler v. Strawberry Hill*, 74 Iowa, 644. As to the liability of private persons or corporations maintaining ways which the public may use for hire, as the payment of a toll, see §§ 66 *et seq.*, *ante*.

² See §§ 171, 184–186, *post*.

³ *Lynch v. Hubbard*, 101 Mich. 43, and see *Detroit v. Blackeby*, 21 Mich. 84; *Detroit v. Chaffee*, 70 Mich. 80.

⁴ *Young v. Waterville*, 39 N. W. Rep. 97 (Mich. 1888); *Sheilhart v. Detroit*, 108 Mich. 309. So if the sidewalk is built over private property. *Will v. Mendon*, 108 Mich. 251.

injuries which are the result, solely, of a defect in the plan by which a street was constructed.¹ Under a statute which provided that any city negligently permitting its streets, sidewalks, &c. to remain out of repair should be liable to any one injured thereby, and permitted cities to raise taxes to keep their streets and sidewalks in reasonable repair, a city was held to be liable for an injury caused by a defective walk, although its charter did not impose upon it the duty of keeping its walks in repair, or authorize it to levy taxes for that purpose.² And if a city has ample funds in its treasury, put there for the express purpose of repairing streets and sidewalks, it cannot escape liability for an accident caused by a defective walk on the ground that the funds raised by taxation for that year have been exhausted, that the city is prohibited by its charter from pledging its credit, and that the money has been raised on the individual credit of members of the common council.³ A statute exempting a city from liability for any misfeasance or non-feasance of its common council or any of the city officials in the discharge of any duty imposed on them as officers, does not relieve the city from liability for failure to discharge any of its corporate functions, one of which is the duty of keeping its streets in repair; and the officials placed in charge of the streets under the direction of the common council, are mere instruments created to perform for the city its corporate functions, the city being liable for the negligence of such officials.⁴ Where

¹ *Hoyt v. Danbury*, 69 Conn. 341.

² *Campbell v. Kalamazoo*, 80 Mich. 655.

³ *Moore v. Ionia*, 81 Mich. 635. In *Whitfield v. Meridian*, 66 Miss. 570, it was held that lack of funds and of power to enforce contributions of labor to repair streets would exempt a municipal corporation from liability for injuries resulting from defects therein; but that the mere fact that all the money raised for street purposes had been expended on certain streets, leaving others in an unsafe condition, would not relieve the corporation from liability for injuries occurring by reason of the unsafe condition of such latter streets. See, also, *Shelby v. Clagett*, 22 N. E. Rep. 407 (Ohio, 1889).

⁴ *Bieling v. Brooklyn*, 120 N. Y. 98. See also to the general principle, *Gray v. Brooklyn*, 50 Barb. 365, 2 Abb. Ct. App. Dec. 267; *Fitzpatrick v. Slocum*, 89 N. Y. 358; *Hardy v. Brooklyn*, 90 N. Y. 435; *Smith v. Rochester*, 76 N. Y. 206; *Maxmilian v. Mayor of New York*, 62 N. Y. 160;

a statute¹ transferred the primary responsibility for injuries caused by defects in highways from the commissioners of highways to towns, it was held that the negligence of the commissioners was still the foundation of the liability, and that the towns became liable in the cases, and those only, in which the commissioners would have been liable before the enactment of the statute.²

§ 168. **Statutes strictly construed; Proximate Cause: Obstructions lawfully in the Way.** — The statute creating the liability is to be construed strictly, in favor of the defendant. Thus the right to recover under it will be limited to the person injured in his own person or property, so that a father cannot maintain an action against the municipality for the loss of the services of his minor son, in his employ, or for expenses incurred in curing the minor, injured by a defect in the highway for which the municipality was responsible, the right to the earnings of the son not being property within the contemplation of the statute creating the liability.³ Nor, under a statute requiring towns to keep highways in good repair, will the town be liable for maintaining, or permitting to exist, within the limits of the highway, a public nuisance, like a pool of stagnant water, caused by abutters sending their drainage on to the highway, unless the nuisance render the highway unsafe for travel and the plaintiff is thereby injured.⁴ So, generally, when the injury is caused by the act of an abutter for which the town is not responsible, and which does not affect the safety of the roadway, as where the abutter suspends a sign over the highway which falls and injures a traveller, liability does not attach.⁵ In these

Ham v. Mayor of New York, 70 N. Y. 459; *Moore v. Mayor of New York*, 73 N. Y. 238.

¹ New York Laws, 1881, c. 700.

² *Lane v. Hancock*, 142 N. Y. 510.

³ *Reed v. Belfast*, 20 Maine, 246. So where the persons injured were the plaintiff's wife and daughter. *Chidsey v. Canton*, 17 Conn. 475, and see *Harwood v. Lowell*, 4 Cush. 310.

⁴ *State v. Burlington*, 36 Vt. 521. The rule is otherwise if the existence of the nuisance makes the highway unsafe. *Hewison v. New Haven*, 37 Conn. 475.

⁵ *Taylor v. Peckham*, 8 R. I. 349. See § 179, *post*.

cases the rule of proximate cause is more strictly applied than in common-law actions. Where, as is generally the case, the statute provides, in effect, that the municipality shall be liable for injuries caused "by reason of" defects existing in the way, the damage, in order to a recovery, must result directly from the want of repairs in the way. It is not enough that the defect in the way may have contributed indirectly to the accident, but the injury must be produced directly by the defect, and this must appear to have been the sole cause of the injury;¹ so that if the negligence of the plaintiff was a joint contributing cause, without which the accident would not have happened, the plaintiff cannot recover.² Since, in order to charge the municipality, its negligence must be the proximate cause of the injury complained of, it is obvious that the municipality will not be responsible for the existence, within the limits of the highway, of a structure or thing placed there by authority of law and which it has not the right to remove, as a telegraph pole placed in the highway by authority of an act of the legislature, and in a location prescribed by the local authority.³ So where in erecting a watering trough within the location of the highway, the selectmen of a town acted, not as agents of the town, but as public officers, charged by the statute with that duty, the town will not be responsible for injuries caused to a traveller by reason of the presence of the trough in the highway.⁴ But, in order to relieve the municipality from liability, it must clearly appear that such was the intention of the statute. Thus where the statute provided that abutters on a highway might construct a sidewalk within the highway, and define its limits by posts, it was held that the provision was not intended to supersede or qualify the general obligation of towns to keep their highways safe.⁵

§ 169. **Negligence of Third Party contributing.** — So, if the negligent act of a third party is a concurrent cause of the in-

¹ *Farnum v. Concord*, 2 N. H. 392, 394.

² *Horrigan v. Clarksburg*, 150 Mass. 218. See § 109, *ante*.

³ *Young v. Yarmouth*, 9 Gray, 386; *Hunt v. Mayor of New York*, 109 N. Y. 134; *Curtis v. Rochester & Syracuse R. R.*, 18 N. Y. 534.

⁴ *Cushing v. Bedford*, 125 Mass. 526.

⁵ *Appleton v. Nantasket*, 121 Mass. 161.

jury complained of, without which it cannot certainly be said that the accident would have happened, the plaintiff is debarred from a recovery. Thus it was held that a city was not liable for an injury caused by the slipping and falling of the plaintiff upon a sidewalk, the fall being the joint result of the unsafe condition of the sidewalk and of steps leading to it and belonging to a private abutter, down which the plaintiff was passing when he was injured;¹ but where a hatchway is put into the sidewalk by an abutter, to give access to a cellar beneath, it is the duty of the municipality to see that it does not make the walk unsafe.² The municipality will not be liable when the negligence of the driver of a carriage was a contributing cause, with a defect in a highway, of the injury;³ or where the plaintiff was knocked down by a boy coasting on a sled on a sidewalk, which by such coasting had been rendered slippery and dangerous.⁴ The same rule was held where the injury was caused by a locomotive run on a railway track illegally laid across the highway.⁵ But those cases are

¹ *Rowell v. Lowell*, 7 Gray, 100. So it is held that the municipality is not liable for an injury occurring through the operation of a derrick by workmen on the highway, although the derrick was insecurely fastened so that if a traveller had been injured by its falling upon him, when not in operation, the defendant might have been liable for such injury. *Pratt v. Weymouth*, 147 Mass. 245. But in *Carterville v. Cook*, 29 Ill. App. 495, 129 Ill. 152, it was held that a municipality was liable for injuries caused to a person by falling from a sidewalk maintained at an unsafe height, without guards, though the direct cause of the accident was the negligence of a third person in pushing the person off the sidewalk. See *Sweeney v. Newport*, 65 N. H. 86; *Hardy v. Keene*, 52 N. H. 370.

² *McClure v. Sparta*, 84 Wis. 269.

³ *Kidder v. Dunstable*, 7 Gray, 104. It is said that where a woman of the age of discretion voluntarily enters the private carriage of another to ride, and by his carelessness in driving over an obstruction in a public way, is injured, his negligence is imputable to her, and bars a recovery by her against the municipality for the injuries received. See *Lake Shore & M. S. R. R. v. Miller*, 25 Mich. 274; *Mullen v. Owosso*, 100 Mich. 103. It is apprehended that these cases do not put the exemption of the municipality from liability upon the true ground. See §§ 105, 106, *ante*.

⁴ *Shepherd v. Chelsea*, 4 Allen, 113.

⁵ *Vinal v. Dorchester*, 7 Gray, 421. See *King v. Russell*, 6 East, 427; *Rex v. Cross*, 3 Camp. 225; *Kelsey v. Glover*, 17 Vt. 708; *Tallahassee v. Fortune*, 3 Fla. 19.

to be distinguished in which the very existence of the defect in the way is due to the negligence of a third party, since, whatever the cause of the defect, the municipality is liable for injuries caused thereby, it having due notice of the existence of the defect. Thus if a third party should leave standing within the travelled limits of the way a sled loaded with logs, the municipality having notice of that fact, and a traveller without notice, and exercising due care, should drive in the dark, against the obstacle and thereby be injured, the municipality would be liable.¹ But if a defect exist in the highway, as ice or snow carelessly allowed to remain upon the road, and by joint reason of the careless driving of a sled loaded with logs and of the defect in the way, the traveller is injured; then the municipality could not be held liable.² So, in an action brought against a town to recover for injuries resulting from defects in a bridge, it was held that if the defect did not arise from any neglect of duty by the defendant, and if it had no knowledge of or reason to suspect the existence of a defect, then it would not be liable.³

§ 170. **Accident contributing : Innocent Act of Third Person : Runaway Horses.** — In a leading case in Massachusetts, the rule was laid down that when the contributing cause of the injury was in itself purely accidental, occurring without the fault or negligence of the plaintiff or of a third person, and such as ordinary prudence or sagacity could not guard against, the plaintiff may still recover. In this case the contributing cause of the injury was the failure of a part of the carriage in which the plaintiff was driving, and the defect charged was the want of a sufficient railing at the side of the way. The court said: "It is in the ordinary course of events, and consistent with a reasonable degree of prudence on the part of the traveller, that accidents will occur: horses may be frightened, the harness may break, a bolt or screw may be dropped. To

¹ See *Snow v. Adams*, 1 Cush. 447. So where the defect was a loose wire lying in the highway which had become charged with electricity by coming in contact with the wires of an electric line. *Bourget v. Cambridge*, 159 Mass. 388.

² *Kidder v. Dunstable*, 9 Gray, 104.

³ *Masters v. Warren*, 27 Conn. 293.

guard against danger by such accidents, the law requires suitable railings or barriers . . . and whatever may be required for the safety of the traveller.”¹ Since there are an indefinite number of concurring causes to produce every event, no act, not negligent, will have the effect to bar the plaintiff from a recovery, and it is accordingly held that a town may be liable for a defect in a highway although the innocent act of a third party is a concurring cause of the injury complained of. Thus it appeared that a telephone wire sloped down from the place at which it was fastened and lay about a foot above the surface of the highway; that the wire caught in the wheels of a wagon approaching the wagon in which the plaintiff was driving, and that the plaintiff saw the wire fifty feet away, and called to the driver of the other wagon who paid no attention to him, and that the plaintiff was unable to turn out or change his seat and was injured in bending back in his seat to avoid the wire. The court said: “If, in the opinion of the jury, the other driver was negligent as towards the plaintiff, and thus had a hand in causing the injury, no doubt the plaintiff cannot recover. . . . But the jury might have found that the other driver was not negligent, and, indeed, that, until it was too late, he was wholly unaware of his entanglement or that there was a wire in the road at all. If so, his co-operation stood on no different footing from the force of gravitation. A town is not exonerated because other causes co-operate with the defect; if it were, it would never be liable. . . . To an extent not yet perhaps exactly determined, wrong-doers are presumed not to contemplate wrong-doing by others unless they are shown in fact and

¹ *Palmer v. Andover*, 2 Cush. 600, and see *Hunt v. Pownall*, 9 Vt. 418; *Howard v. North Bridgewater*, 16 Pick. 189; *Rowell v. Lowell*, 7 Gray, 100; *Winship v. Enfield*, 2 N. H. 197; *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, 41 N. H. 317; *Kelsey v. Glover*, 15 Vt. 708; *Allen v. Hancock*, 16 Vt. 230; *Dreher v. Fitchburg*, 22 Wis. 675; *Houfe v. Fulton*, 29 Wis. 296; *Kelley v. Fond du Lac*, 31 Wis. 179. The rule is applied although the defect or dangerous object which is a concurring cause of the accident is outside of the travelled track, if it be within the limits of the location of the way. See *Morse v. Richmond*, 41 Vt. 435; *Hodge v. Bennington*, 43 Vt. 451; *Moulton v. Sanford*, 51 Maine, 127; *Perkins v. Fayette*, 68 Maine, 152; *Foshay v. Glen Haven*, 25 Wis. 288.

actually to have contemplated it. Therefore, generally, they are not liable if another wrong-doer intervenes between their act and the result. . . . But the mere fact that another human being intervenes is not enough. . . . In the case of towns sued for a defect in a highway, the wrongful act of the third person need not intervene subsequently,—it is enough that it co-operates with the defect at the moment,—but the principle is the same. It is because the act is wrongful, including under this head negligence, not because it is a concurring cause, that the defendant escapes. If the act which concurs with the defect in producing the result complained of is innocent, and is of a kind which the defendant is bound to expect and provide for,—such, for instance, as another man's driving upon the road,—the jury may find against the town as well as when a particular state of the weather is the concurrent cause.”¹ The application of the rule has been often discussed in the case of accidents in which the running away of a horse, driven upon the highway, has been an antecedent or concurring cause of the injury complained of. In Massachusetts, it is held when a horse, while being driven with due care upon the highway, becomes, by reason of fright, disease, or viciousness, actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and, in this condition, the traveller comes upon a defect in the highway, by which an injury is occasioned, that the municipality is not liable for the injury, unless it appears that the accident would have happened even if the horse had not been uncontrollable.² It was contended in argument that the case should be governed by the rule laid down in *Palmer v. Andover*,³ the contributing cause of the injury being an unavoidable accident, but the court said: “The case is unlike that of *Palmer v. Andover*, . . . for in that case, after the horses broke loose, . . . they ran away

¹ *Hayes v. Hyde Park*, 153 Mass. 514.

² *Titus v. Stockbridge*, 97 Mass. 258. Compare *Ring v. Cohoes*, 77 N. Y. 83.

³ 2 Cush. 200, see *supra*. See comments upon certain apparent inconsistencies between the rule in *Palmer v. Andover* and the later Massachusetts decisions as to runaway accidents in *Houfe v. Fulton*, 29 Wis. 196.

and did no injury, and if the place where they left the carriage had been ascending ground, the carriage would have remained where it was, and no injury would have happened. . . . But the bolt was drawn out at a place where the carriage was going down hill, and the natural laws of gravitation and motion carried it to the place where the road was defective. It is not inconsistent with . . . that case . . . to hold that the defendants are not liable for an injury occasioned, as this has been, by the action of a horse that was, at the time of the accident, unfit for use, and was beyond the driver's control, although the defect in the highway was also a cause of the injury." The rule, as thus expressed, has been followed in a line of cases in Massachusetts,¹ in which it is held that if a horse throws his tail over a rein so as to free himself from control for a considerable time, and while so freed comes upon a defect in the way whereby an injury is caused, the town is not liable.² But it is held that if there be only a momentary loss of control, and the control would have been instantly regained if the plaintiff's carriage had not come in contact with the defective place, then the municipality will be liable;³ and that, if a horse carefully driven and not escaping from control is caused to step out of the travelled track by an object within the limits of the way which would cause an ordinarily gentle and well-broken horse to do so, so that the traveller is brought in contact with a defect, the town may be liable for the resulting injury. But it is held otherwise if the horse is vicious or ill-broken, and shies at an object which would not startle an ordinarily gentle and well-broken horse.⁴ In Wisconsin, in a well-considered case, it was held, generally, when, besides the defect in the way, there is another proximate cause contributing directly to produce the injury, which cause is not to be attributed to the plaintiff's negligence, nor to that

¹ See *Horton v. Taunton*, 97 Mass. 266, n.; *Fogg v. Nahant*, May v. Nahant, 98 Mass. 578.

² *Bemis v. Arlington*, 114 Mass. 507; *Cushing v. Bedford*, 125 Mass. 526; *Seannal v. Cambridge*, 163 Mass. 91.

³ *Babson v. Rockport*, *Hartwell v. Rockport*, 101 Mass. 93.

⁴ *Stone v. Hubbardston*, 100 Mass. 49; and see *Cushing v. Bedford*, 125 Mass. 526; *Higgins v. Boston*, 148 Mass. 484.

of any third person, that the municipality may be liable if the injury would not have been sustained but for the defect in the way.¹ While it is to be observed that the law recognizes but one proximate cause for each event, and so the expression of the rule in this case cannot be admitted to be correct, it is evident that by "proximate" the court intend "concurring" cause, and as thus stated the rule would seem to be sound. The court did not decide whether the general rule would apply where a horse, at the time of the injury so received, was in a condition of fright or unmanageableness, but held that, if such a case constituted an exception to the general rule, no such exception existed in the case where a horse should shy or start, or get momentarily out of control.² The converse of the rule was applied where a horse fell, either from disease or because he was improperly harnessed and driven, against the railing of a bridge which gave way, and it was held that the imperfection of the bridge and railing were not the proximate cause of the resulting accident.³

§ 171. When the Liability attaches : Dedication : Prescription.

— A municipal corporation becomes legally responsible for the condition of its highways, (1) so soon as the same are duly opened for public travel, that is, located, constructed, and accepted by the proper authority ;⁴ or, (2) in those juris-

¹ *Houfe v. Fulton*, 29 Wis. 296.

² See, to the same effect, *Kelly v. Fond du Lac*, 31 Wis. 179, where the court, referring to *Houfe v. Fulton*, *supra*, say: "We believe we were correct in [the] statement of the principle governing the Massachusetts decisions; but . . . we are certainly not disposed to go further in the application of it." See *Peterson v. Chicago & W. M. R. R.*, 64 Mich. 621; *Putman v. New York Central & H. R. R. R.*, 51 N. Y. S. C. 439; *Olsen v. Chippewa Falls*, 71 Wis. 558; *Belk v. People*, 125 Ill. 184; *Joliet v. Shufeldt*, 144 Ill. 403; *Rock Falls v. Wells*, 169 Ill. 224; *Yeaw v. Williams*, 15 R. I. 20; and other cases cited § 99, *ante*, and notes.

³ *McClain v. Garden Grove*, 83 Iowa, 235.

⁴ *Bliss v. Deerfield*, 13 Pick. 102. See *Jones v. Andover*, 9 Pick. 148; *Bowman v. Boston*, 5 Cush. 1. But, after a way has been legally laid out, and a time fixed for the municipality to complete it, and it has, in fact, been opened for travel, travellers have a right to presume that it is a public way, and the duty of keeping it safe will exist from the time of such actual opening. *Drury v. Worcester*, 21 Pick. 44, and see *Howard v. Mendon*,

dictions where highways may be established by prescription, when a public user is shown, general, uninterrupted, and continued for the length of time necessary to establish a prescription. The user being established, the presumption arises that whatever was necessary to create the right was rightly done,¹ and no evidence beyond the proof of user need be produced.² It is held that, in the absence of a statute removing or qualifying the common-law rule on the subject, the municipality is bound to keep in order any street or part of a street which it has graded or improved.³ It has been held that before the dedication of a street can impose upon the municipality the duty of keeping it in repair, there must be an acceptance of it by the proper authority, or else an uninterrupted user of it by the public for more than twenty years;⁴ but the cases, generally, do not appear to consider that the rights of the traveller as against the municipality rest upon any prescription or definite lapse of time.⁵ If the corporation has treated the way as a public street by taking charge

117 Mass. 585. On the other hand, the corporation may show, as matter of defence, that a road was not in fact duly laid out and accepted, although used and repaired as such. *Jones v. Andover*, 6 Pick. 146.

¹ A sidewalk in a village became a part of the highway by use and dedication. The plaintiff was injured by falling down some steps leading from the sidewalk to the basement of an abutting building. The steps had always been maintained by the owner of the building without any railing. It was held that any right of the owner to maintain said steps was presumed to have been determined or waived; and that due consideration was to be presumed to have been paid him when he permitted the sidewalk to become a part of the highway, and, so, that the village was liable for injuries caused to a traveller by its failure properly to guard the stairway. *Sweeney v. Newport*, 65 N. H. 86.

² *Jennings v. Tisbury*, 5 Gray, 73. See *Stark v. Lancaster*, 57 N. H. 88; *Conrad v. Ithaca*, 16 N. Y. 158; *Weet v. Brockport*, 16 N. Y. 161; *Todd v. Troy*, 61 N. Y. 506; *Sewell v. Cohoes*, 75 N. Y. 45; *Coates v. Canaan*, 51 Vt. 131; *James v. Portage City*, 48 Wis. 677; *Manderschild v. Dubuque*, 25 Iowa, 108; *Phelps v. Mankato*, 23 Minn. 277; *Aurora v. Colshire*, 55 Ind. 484.

³ *Triese v. St. Paul*, 36 Minn. 526.

⁴ *Kennedy v. Cumberland*, 65 Md. 514.

⁵ See *Detwiler v. Lansing*, 95 Mich. 484; *Boyd v. Springfield*, 62 Mo. App. 456; *Hogan v. Chicago*, 168 Ill. 551; *Union Stock Yards v. Karlik*, 170 Ill. 403, and cases cited *ante*.

of it and regulating it, and a traveller is injured by the negligent manner in which this is done, the corporation cannot, being sued for such injury, require the plaintiff to prove the regularity of the proceedings by which the way became a street, nor the authority by which the street was established,¹ since a mere defect in the form of proceedings in the laying out of the way will not avail as a defence to an action for injuries.² And it is held that if a municipality permits the public to use a way laid out and partially improved but not formally opened as a street, it is bound to keep such a way reasonably safe.³ So if a city permits a sidewalk to be maintained beyond the sidewalk line as fixed by ordinance, and exercises control over it, it is bound to keep the walk in repair.⁴ The liability of a municipality for an injury caused by a defective highway is the same whether the highway was established by a laying out or by a dedication and user.⁵ But, there being no act done by the municipality from which an acceptance of the way can be inferred, it will not be held responsible for damages caused by defects existing in private ways, although leading into highways and commonly used as thoroughfares;⁶ and this is the rule whether the private way is or is not designated as such by signs or otherwise.⁷ In order to establish a highway by prescription, when there is no proof

¹ *New York City v. Sheffield*, 4 Wall. 189. See *Shartle v. Minneapolis*, 17 Minn. 308; *Cleveland v. St. Paul*, 18 Minn. 279; *Requa v. Rochester*, 45 N. Y. 129; *Bissell v. New York Central R. R.*, 23 N. Y. 64; *Houfe v. Fulton*, 34 Wis. 608, 619; *Codner v. Bradford*, 3 Chandl. (Wis.) 291; *Williams v. Cummington*, 18 Pick. 312; *Leavenworth v. Laing*, 6 Kan. 274; *McDonough v. Virginia City*, 6 Neb. 90; *State v. Gibson Commissioners*, 80 Ind. 478; *Norris v. Haverhill*, 62 N. H. 89.

² *Seymour v. Salamanca*, 137 N. Y. 364.

³ *Schafer v. New York*, 154 N. Y. 466.

⁴ *Chadron v. Glover*, 43 Neb. 733.

⁵ *Sweeney v. Newport*, 65 N. H. 86.

⁶ *Durgin v. Lowell*, 3 Allen, 398.

⁷ *Warner v. Holyoke*, 112 Mass. 362. But if a town permits a turnout to exist from the travelled part of its highway to a private way, over adjoining land, with all the characteristic marks of a highway, it will be bound to keep such part of the turnout as is within the location of the highway in suitable repair for the travel customarily passing over it. *Stark v. Lancaster*, 57 N. H. 88. See *Stack v. Portsmouth*, 52 N. H. 221.

of dedication, and where the element of dedication does not subsist, it will be necessary to prove actual public use, general and uninterrupted, and continued for a certain length of time. In general it must be such as to warrant a presumption of laying out, dedication or appropriation, by parties having authority so to lay out, or a right so to appropriate, like that of prescription or non-appearing grant in case of individuals. It stands upon the same legal grounds, that is, upon a presumption that whatever was necessary to give the act legal effect and operation was rightly done, though no other evidence of it can be produced except the actual enjoyment of the benefits conferred by it.¹ It is to be observed that, now, in many jurisdictions, it is provided, substantially, that highways shall not be created by mere prescription; as that, in order to charge the municipality with liability for accidents occurring on a way which has not been formally laid out or accepted, it must appear that the municipality has, within a time certain, made repairs or done other acts of ownership upon the way in question.

§ 172. **Duty not to be avoided by Delegation.** — If a municipality intrusts to a third person not its servant, as to an independent contractor, the duty of keeping its ways safe from dangers which it knows to exist, or the doing of work which will necessarily be attended with danger, it remains liable to persons injured thereby through the negligence of the person to whom the duty has been intrusted. The rule rests upon the principle that if the performance of a lawful contract will, of necessity, bring wrongful consequences to pass unless guarded against, and if the contract cannot be performed except under the title of the employer, who retains the right of access to the premises, the law requires the employer, at his peril, to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs.²

¹ Per Shaw, C. J., in *Jennings v. Tisbury*, 5 Gray, 73, 74.

² *Bower v. Peate*, 1 Q. B. D. 321; *Dalton v. Angus*, 6 App. Cas. 740; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Hole v. Sittingbourne & Sheerness Railway*, 6 H. & N. 500; *Storrs v. Utica*, 17 N. Y. 104; *Detroit v. Corey*, 9 Mich. 165; *Prentiss v. Boston*, 112 Mass. 43; *Woodman v. Metropol-*

Thus the municipality is answerable for injuries caused by improperly guarded excavations made in its streets by an independent contractor,¹ and for his failure to place lights around such excavations at night when this is a necessary precaution for the safety of the public, although the contractor has agreed to perform the duty.² So the liability of the municipality continues as to a street which is being paved by an independent contractor, the work being dangerous.³ The same rule applies when the municipality delegates a work, in its nature dangerous, to the abutters along the line of the way.⁴ If a municipality, by the grant of the exercise of the right of eminent domain to a railway corporation, permit it to build street crossings for its road, the municipality will remain liable for injuries caused by the defective construction of such crossings, and it is held that, if the construction of the crossing causes an obstruction to the highway, the municipality is bound, while the danger lasts, to provide a suitable by-way for travellers.⁵ It is to be observed that when the obstruction or defect created in the way is purely collateral to the work contracted or delegated to be done, and is entirely the result of the wrongful act of the contractor, or person to whom the work is delegated, or of his servants, the employer is not liable therefor.⁶

itan R. R., 149 Mass. 335 ; *Blessington v. Boston*, 153 Mass. 409 ; *Circleville v. Neuding*, 41 Ohio St. 465 ; *Jefferson v. Chapman*, 27 Ill. App. 43, 127 Ill. 438.

¹ *Robbins v. Chicago*, 4 Wall. 657 ; *St. Paul Water Co. v. Ware*, 16 Wall. 566 ; *Baltimore v. O'Donnell*, 53 Md. 110 ; *Detroit v. Corey*, 9 Mich. 165 ; *Circleville v. Neuding*, 41 Ohio St. 465 ; *Storrs v. Utica*, 17 N. Y. 104 ; *Logansport v. Dick*, 70 Ind. 65 ; *Birmingham v. McCrary*, 84 Ala. 469 ; *Houston v. Great Northern R. R.*, 50 Tex. 77.

² *McAllister v. Albany*, 18 Or. 426 ; *Flater v. Fey*, 70 Mich. 644 ; and see *Miller v. St. Paul*, 38 Minn. 134 ; *Barton v. McDonald*, 81 Cal. 265.

³ *Southwell v. Detroit*, 74 Mich. 438.

⁴ *Birmingham v. McCrary*, 84 Ala. 469, and see *Dooley v. Sullivan*, 112 Ind. 451 ; *Warsaw v. Dunlap*, 112 Ind. 576.

⁵ See *Kimball v. Bath*, 38 Maine, 219 ; *Phillips v. Veazie*, 40 Maine, 96 ; *Willard v. Newbury*, 22 Vt. 458 ; *Batty v. Duxbury*, 24 Vt. 155 ; *Barber v. Essex*, 27 Vt. 62 ; *Lowell v. Boston & Lowell R. R.*, 23 Pick. 24 ; *Murphy v. Chicago*, 29 Ill. 279.

⁶ *Robbins v. Chicago*, 4 Wall. 657, and see §§ 39 *et seq.*, *ante*, notes and cases cited.

§ 173. **Traveller: Who is.**—The word “traveller,” as used in the statutes creating the municipal liability, intends every one, whatever his age or condition, who has occasion to pass over the highway for any purpose of business, convenience, or pleasure, so long as such purpose is not unlawful. But, in order to recover for injuries caused by alleged defects in the way, it must appear that the injured person was using it for that purpose for which the municipality is bound to maintain it. “It is for travellers, and their horses, carts, teams, and carriages that highways are to be opened, kept in repair, and amended from time to time. And the statute has not provided that they shall be kept safe and convenient for any others. A street or highway may be put to a use at a particular time and place, and that use be equally foreign to the design of passing and repassing thereon, for the purpose of travel, . . . and the appropriation may require a much better condition of the ground than would be necessary to make it safe and convenient for travellers. Hence, the rule of safety and convenience for the traveller might differ essentially from that which would be applied to a use not provided for or contemplated by the statute. The public have no right in a highway except the right to pass and repass thereon.”¹ Thus if a child uses the way as a playground, merely, and while so using it is injured by reason of a defect in it, he cannot recover.² And it has been held that a town was not liable to

¹ Per Tenney, C. J., in *Stinson v. Gardiner*, 42 Maine, 248, and see *Peck v. Ellsworth*, 36 Maine, 393; *Leslie v. Lewiston*, 62 Maine, 470; *Pearsall v. Post*, 2 Wend. 111; *Stackpole v. Healy*, 16 Mass. 33; *Chicago v. Starr*, 42 Ill. 277.

² *Blodgett v. Boston*, 8 Allen, 237; *Tighe v. Lowell*, 119 Mass. 472. But where a child under two years of age went into the public street in a country village, for air and exercise, in charge of a brother, eight years old, and the two children stood in the street to watch some boys at play, and the younger ran from his brother and fell into an open ditch and was injured, it was held that he might recover as being a traveller. *Bliss v. South Hadley*, 145 Mass. 91, and see *O'Shaughnessy v. Suffolk Brewing Co.*, 145 Mass. 569; *Gulline v. Lowell*, 144 Mass. 491. The fact of a child running and rolling a hoop on a sidewalk, on her way to meet play mates is not inconsistent with her being a traveller. *Reed v. Madison*, 83 Wis. 171. But an adult using a sidewalk solely for the purpose of playing with a dog, has not the rights of a traveller to recover for injuries

a person who, while stopping in the highway for the purpose of conversation, leaned against a defective railing and was injured thereby.¹ So if one, not a traveller, uses or steps upon the highway for his convenience in carrying on his business, and is injured by reason of a defect existing therein, he has no ground of action against the municipality.² But the mere fact that a traveller lingers or stops in his journey for a reasonable time, for some incidental purpose, will not necessarily deprive him of his rights as a traveller. Thus where one stops his horse and alights from his carriage to repair a hole in the roadway,³ or stops to pick berries by the roadside,⁴ or to observe a procession or band pass,⁵ he is not debarred from a recovery if while so stopping he is injured by reason of a defect in the way. In doubtful cases, the question

caused by a defect therein. *Jackson v. Greenville*, 72 Miss. 220. In *Keefe v. Chicago*, 2 Chic. L. J. 263 (Ill.), it was held that a child may lawfully be upon the sidewalk for pleasure only, that is to say, for play, and that the city owes the same duty to have the sidewalk in a reasonable state of repair, as to such child, as it does to those who are using the sidewalk for the purpose of passing and repassing on business. The court, in this case, attempts to explain the expression in *Chicago v. Starr*, 42 Ill. 277, where it was said: "It is to be borne in mind that it is not the duty of the city of Chicago to make its streets a safe playground for children. That is not the purpose for which streets are designed." It is to be observed that the rule, which seems to be supported by the weight of authority, that a defendant owes no peculiar duty towards infant or ignorant trespassers (see §§ 76-78, and NOTE following § 78, *ante*, and cases cited), applies equally when the defendant is a municipality. See *Clarke v. Manchester*, 62 N. H. 577; *Clarke v. Richmond*, 83 Va. 355; *Gaughan v. Philadelphia*, 110 Penn. St. 503.

¹ *Stickney v. Salem*, 3 Allen, 374.

² *McDougal v. Salem*, 110 Mass. 21. In this case a bridge, having a draw, formed part of the highway, and while a vessel was passing through the open draw one of her crew who had got upon the raised leaf of the draw to aid her passage was injured by a defect in the construction of the draw, and it was held that he had no right of action as against the city which was bound to keep the draw in repair. A traveller on a highway guilty of a lack of ordinary care is liable for an injury resulting therefrom to a person engaged in repairing such highway, and in the exercise of due care. *Riley v. Farnum*, 62 N. H. 42.

³ *Babson v. Rockport*, 101 Mass. 93.

⁴ *Britton v. Cummington*, 107 Mass. 347.

⁵ *Varney v. Manchester*, 58 N. H. 430.

whether the plaintiff was in fact a traveller will be for the jury,¹ but it is held that the question will not be submitted to the jury when there is no evidence tending to show that he was not a traveller.²

SECTION II.

DEFECTS IN HIGHWAYS.

§ 174. **What are: Generally.** — The statutes creating the municipal liability provide, in substance, that highways shall be kept in repair so as to be safe and convenient for travellers. Thus the municipality is not liable except for such defect or want of repair as makes the highway unsafe or inconvenient. On the other hand, anything in the state or condition of the way which makes it unsafe for ordinary travel is a defect or want of repair, whether the fault be in the construction of the way itself, or in obstructions carelessly permitted to be placed in or upon it; whether by the operation of natural causes, or by the act of public officers, private individuals, or corporations.³ Thus a hole, trench, or excavation in a highway, caused by an imperfect laying out or working of the highway, or by travel,⁴ or by the operations of an abutting owner,⁵ may be a defect.⁶ So logs, piled within the limits of the highway

¹ *Hunt v. Salem*, 121 Mass. 294.

² *Norris v. Haverhill*, 65 N. H. 89.

³ *Barker v. Roxbury*, 11 Allen, 318; *King v. Oshkosh*, 75 Wis. 517; *Pettengill v. Yonkers*, 116 N. Y. 558. The negligence of the municipality must be shown in order to make it liable for injuries resulting from obstructions placed in a street by a trespasser. *Davis v. Omaha*, 47 Neb. 836.

⁴ *Merrill v. Wilbraham*, 11 Gray, 154.

⁵ *Philadelphia v. Smith*, 23 W. N. C. 243. A coal-hole in a sidewalk, if so constructed as to be dangerous, is a defect. *Hanscom v. Boston*, 141 Mass. 242; *McGaffigan v. Boston*, 149 Mass. 289; *Dickson v. Hollister*, 123 Penn. St. 421. An open well in the travelled part of the highway is a nuisance for the existence of which the municipality is responsible. *Willard v. Newbury*, 22 Vt. 458; *Batty v. Duxbury*, 24 Vt. 155.

⁶ *McGrath v. Bloomer*, 73 Wis. 29; *Dooley v. Sullivan*, 112 Ind. 451; *Lincoln v. Beckman*, 23 Neb. 677; *Requa v. Rochester*, 45 N. Y. 129. It is no defence to an action for an injury caused by a defective sidewalk

by an abutter,¹ or a post standing within the line of travel,² or a show-board partly supported within the limits of the sidewalk,³ or a decayed and dangerous tree,⁴ or a plank projecting above the level of the way at a crossing,⁵ or a man hole, in a sidewalk, having an insufficient cover,⁶ or dangerous machinery needlessly left in the way,⁷ may constitute a defect for the existence of which the municipality will be responsible. And, in the absence of a statutory limitation of the liability, this exists equally as to concealed defects and as to those which are obvious upon inspection ; as where the defect was the weakness of a stone slab in a sidewalk in a city, covering a vault which was appurtenant to an abutting estate, and it was held that a foot-passenger injured by the breaking of the slab as he passed over it might recover as against the city.⁸ But the rule seems to be otherwise when the municipality is not itself responsible for the existence of certain concealed defects that such sidewalk was not built by the city. *Champaign v. McGinnis*, 26 Ill. App. 338, and see §§ 43, 172, *ante*. So where a highway had been excavated by the owners of the fee, and made impassable for teams, and a barricade had been erected against them, and a person using a much travelled foot-path fell into the excavation, it was held that the municipality was liable for permitting the encroachments, and for not keeping the highway safe. *Horey v. Haverstraw*, 47 Hun, 356.

¹ *Snow v. Adams*, 1 Cush. 447.

² *Cogswell v. Lexington*, 4 Cush. 307.

³ *Langan v. Atchison*, 35 Kan. 318.

⁴ *Chase v. Lowell*, 151 Mass. 422 ; *Gubasco v. New York*, 14 Daly, 559 ; *Weller v. McCormick*, 52 N. J. L. 470 ; *Glantz v. South Bend*, 106 Ind. 305.

⁵ *Winn v. Lowell*, 1 Allen, 177. See *French v. Brunswick*, 21 Me. 29.

⁶ *Lincoln v. Detroit*, 101 Mich. 245.

⁷ *Osage City v. Larkins*, 40 Kan. 206. The rule is otherwise if the machinery is placed in the highway for a legitimate purpose. *Wood v. Independent School Dist. of Mitchell*, 44 Iowa, 27. Where a city permitted a street-car company to locate a turn-table in the public street, in such a manner that, in using it, a part of a car would project over the sidewalk, it was held that the existence of the turn-table did not constitute a street obstruction, the city having exercised a discretion in the premises which was not revisable, and the sidewalk having no right to freedom from encroachment superior to that of the carriage-way. *Fitch v. New York*, 23 J. & S. (N. Y. S. C.) 494.

⁸ *Burt v. Boston*, 122 Mass. 223. See *Hand v. Brookline*, 126 Mass. 324.

fects. Thus it is held that the fact that a defective cess-pool is constructed by strangers under the surface of the street will not make the municipality liable for injuries caused thereby, unless it had notice of the existence of the defect; the mere fact of the existence of the cess-pool within the limits of the way not being decisive of negligence on the part of the municipality, since many uses may properly be made of land within the limits of a public way, and beneath the surface thereof, which are not inconsistent with the exercise of the public easement.¹ And "the traveller may be subjected to inconvenience or hazard from various sources, none of which would constitute a 'defect or want of repair' . . . for which the town would be responsible. He might be annoyed by the action of the elements; . . . against which . . . the town would be under no obligation to furnish him protection. He might be obstructed by a concourse of people, by a crowd of carriages; his horses might be frightened by the discharge of guns, the explosion of fireworks, by military music, by the presence of wild animals; his health might be endangered by pestilential vapors, or by the contagion of disease; and these sources of discomfort and danger might be found within the limits of the highway, and continue for more than twenty-four hours, and yet that highway not be, in any legal sense, defective or out of repair. . . . There are nuisances upon travelled ways for which there is no remedy against the town. . . . If the owner of a distillery or of a manufactory adjoining the street of a city, should discharge continuously from a pipe . . . opening towards the street a quantity of steam or hot water, to the . . . injury of passers-by, they must . . . seek redress in some other mode than by an action for a defective way. If the walls of a house adjoining a street in a city were erected in so insecure a manner as to be liable to fall upon persons passing by, or if the eaves-trough or water conductor was so arranged as to throw a stream from the roof upon the side-

¹ *Hoey v. Natick*, 153 Mass. 528. It was held that the momentary negligence of a draw-tender, in operating the draw whereby a traveller was injured, the draw and its approaches being safe and sufficient, did not create a defect in the highway for which the city bound to maintain the way would be answerable. *Butterfield v. Boston*, 148 Mass. 544.

walk, there being in either case no structure erected within or above the travelled way, it would not constitute a defect in the way.”¹ It is held that a person driving on a street railway track assumes the ordinary risks attending such use; such as the dropping of a wheel into a rut outside the rail, worn by such frequent dropping of wheels;² and that a municipality is not chargeable with negligence when an accident which, according to common experience was not likely to happen, occurs to a traveller by reason of some slight defect in a way, such as a slight depression in the middle of a flagged sidewalk, which had existed for several years without any accident;³ or for an injury caused by the fright of a horse at a noise produced by the contact of a wheel of a carriage with a stone in the street.⁴

§ 175. **General Obligation as to Construction and Maintenance of Ways.**—It is the duty of the municipality so to construct and maintain its public ways that these shall be safe and convenient for ordinary use and travel. In performing this duty, the corporation is bound to exercise ordinary care and diligence, adapted to the work in hand, but it is not bound to provide against the possibility of accident.⁵ A mere error of judgment in laying out a way is not negligence.⁶ A municipality is not bound to pave a street with a particular material, or in a particular method.⁷ The liability of the municipality, if it exists at all, is absolute, and, after reasonable or statutory notice and opportunity to repair, the corporation will be responsible for injuries resulting from want of repair in the way, and the question will not be open whether the corporation

¹ Per Hoar, J., in *Hixon v. Lowell*, 13 Gray, 59, 63.

² *Kornetzski v. Detroit*, 94 Mich. 341.

³ *Beltz v. Yonkers*, 148 N. Y. 67.

⁴ *Bowes v. Boston*, 155 Mass. 344.

⁵ *Randall v. Cheshire*, 6 N. H. 147; *Bishop v. Schuylkill Township*, 8 Atl. Rep. 449 (Penn. 1887). So as to draw or swing bridges forming a part of the highway, *Joliet v. Verley*, 35 Ill. 58, and as to sidewalks, *Chicago & Alton R. R. v. Springfield & Northern R. R.*, 67 Ill. 143; *Chicago v. McGiven*, 78 Ill. 347.

⁶ *Betts v. Gloversville*, 8 N. Y. Sup. N. E. Rep. 795 (1890).

⁷ *Megaree v. Philadelphia*, 153 Penn. St. 340.

had, in fact, exercised diligence in keeping the way in repair.¹ So where the engineer of a city furnished a defective plan for a bridge, and the bridge, being built in accordance with it, fell, it was held that the city was liable for resulting injuries.² The same general rule is applied in fixing the liability of the licensees of the municipality. Thus where it appeared that a pole erected by a defendant street railway company for the purpose of supporting its trolley-wires constituted a dangerous obstruction in the highway, by reason of which the plaintiff was injured; it was held not to be a defence to the action that the pole was located and maintained in accordance with the municipal charter and ordinances.³ But the municipality will not be liable for the operation of causes which it had neither the power nor the right to control. Thus if it keeps its highway within the defined limits of the location in suitable repair, it has performed its duty, and is not responsible for an injury caused by the narrowness, crookedness, or inconvenience of a highway which has been duly laid out or located by some other authority.⁴ When the defect alleged consists in the improper construction of a way or sidewalk, and the testimony is conflicting, or the inferences to be drawn from it are doubtful, the question whether the construction was safe and proper is for the jury.⁵

¹ *Prindle v. Fletcher*, 39 Vt. 257; *Clark v. Corinth*, 41 Vt. 449; *Ward v. Jefferson*, 24 Wis. 342.

² *Dayton v. Pease*, 4 Ohio St. 80, and see *Cincinnati v. Stone*, 5 Ohio St. 38; *City of New York v. Sheffield*, 4 Wall. 189.

³ *Cleveland v. Bangor St. R. R.*, 86 Maine, 232.

⁴ *Billings v. Worcester*, 102 Mass. 329.

⁵ *Shippey v. Au Sable*, 65 Mich. 494; *Kendall v. Albia*, 73 Iowa, 241; *Gosport v. Evans*, 112 Ind. 133; *Tabor v. St. Paul*, 36 Minn. 188. Thus the question whether glass set in a sidewalk to afford light to an area below is unsafe by reason of its smoothness or slipperiness is a question of fact. *Chicago v. McGiven*, 78 Ill. 347. An excavation made in a street by the authorities, so as to cause an abrupt descent thereto from a public alley, and render egress from the alley to the street dangerous, is a defect. *Requa v. Rochester*, 45 N. Y. 129. But a step, properly constructed, from a sidewalk to a street crossing, is not a defect for which the municipality will be responsible. If, however, the alleged defect consist in the decay of the step, thereby making it dangerous, the question, ordinarily, will be one of fact. *Miller v. St. Paul*, 38 Minn. 134. In an action

§ 176. **Defects arising outside of the Way.** — It is a general rule that municipal corporations are not liable for injuries caused by the condition of things existing outside of the highway.¹ Thus a city is not liable for an injury received by a traveller by falling into an excavation unguarded by lights or railings, situated just outside the limits of a public street in a vacant lot upon which the plaintiff entered voluntarily, in the night-time, to witness the licensed exhibition of a circus,² but it was held that an excavation made for municipal purposes, close to a street crossing, was a defect for which the municipality might be liable.³ The general rule stated obtains although the traveller when he receives the injury is within the limits of the highway. Thus it is held that a city is not liable for an injury caused to a foot-passenger on a sidewalk which the city is bound to keep in repair, by reason of the falling upon him of an overhanging mass of snow and ice from a building not owned by the city, this not being a defect or want of repair in the highway within the meaning of the statute creating the liability.⁴ The rule has been extended to the case of an injury received by reason of the falling of a sign, suspended from a building owned by an abutter, into the street;⁵ and it was held that a

against a city for injuries caused by an explosion at a man-hole in a street, it appeared that steam-heating pipes had been laid so near gas pipes that the gas pipes, being dislocated by the digging and softened by the heat, had leaked, and a consequent accumulation of gas, becoming ignited, had probably caused the explosion. The steam-heating enterprise was a new one, but was properly authorized by charter and city ordinance. There was no positive proof of any lack of care in conducting the work of locating the pipes, or that the explosion ought to have been anticipated. It was held, on these facts, that negligence on the part of the city had not been shown. *Hunt v. New York*, 109 N. Y. 134.

¹ *Keith v. Easton*, 2 Allen, 552; *Barber v. Roxbury*, 11 Allen, 318; *Beall v. Athens*, 81 Mich. 536; *Goodin v. Des Moines*, 55 Iowa, 67; *Haines v. Barclay Township*, 181 Penn. St. 521. See § 190, *post*.

² *Morgan v. Hallowell*, 57 Maine, 175, and see *Biggs v. Huntington*, 32 W. Va. 55.

³ *Hall v. Manson*, 99 Iowa, 698.

⁴ *Hixon v. Lowell*, 13 Gray, 59.

⁵ *Taylor v. Peckham*, 8 R. I. 349. Where an injury was caused by the fall of a heavy, unfastened theatre bill-board which stood at the

rope, stretched over the highway, and fastened at each end to objects outside the location, was not a defect for which the municipality would be liable in case of accident.¹ But an important exception to the general rule arises when the corporation has left the line of the location of the way unmarked and undesignated, so that a traveller, in the exercise of due care, cannot distinguish it, and, passing outside of the location, is injured by some defect apparently within the limits of the way. Thus where the line of the highway was not designated by visible objects, and travellers had been accustomed to drive outside the limits of the location, and the plaintiff, so driving, was injured by coming into contact with a post standing outside of but near the true line of the highway, the corporation was held to be responsible.² It is obvious that the traveller, in such cases, passes over the line of the location by the invitation or procurement of the corporation, and so it is held that the municipality is liable for injuries caused by a defective sidewalk which it has built and maintained as such, or of which it has assumed control, although such sidewalk be, in fact, without the limits of the location;³ provided that the boundary line of the highway is not so marked and defined as to inform travellers whether

entrance of a theatre near the sidewalk, where it was likely to be blown over, the municipality was held liable. *Carson v. Ottumwa*, 102 Iowa, 99.

¹ *Barber v. Roxbury*, 11 Allen, 318. The opinion in this case was by the majority of the court, and distinguishes the case from those in which the objects overhanging the way were fixed and permanent structures. See *Drake v. Lowell*, 13 Met. 292, and § 179, *post*. Where by the order of a judge of a State court, a rope was stretched across a public street with the intent to prevent travel, the noise of which disturbed the court, it was held that the city was not liable to a traveller in the street who was injured by the rope. This was upon the ground that when the court, in its discretion, deems it essential to the proper administration of justice to close streets, so as to prevent noises which disturb the proceedings of the court, it has a right to do so. *Belvin v. Richmond*, 85 Va. 574.

² *Coggswell v. Lexington*, 4 Cush. 307, and see *Hayden v. Attleborough*, 7 Gray, 388.

³ *O'Neill v. West Branch*, 81 Mich. 544; *Foxworthy v. Hastings*, 25 Neb. 133; *Chadron v. Glover*, 43 Neb. 733; *Mansfield v. Moore*, 124 Ill. 133.

they are within the limits of it.¹ So, if a municipality deposits, or permits others to deposit, refuse matter in a river, close to, and adjoining the end of a public street, so that the deposit appears to make a prolongation and part of the street, and the same is dangerous to one stepping thereon, the corporation may be liable to one injured by stepping upon it.²

§ 177. **Defect or Dangers existing outside the Travelled Track.**

—It is apprehended that the duty of the municipality to keep the way in repair throughout, from one bound of the location to the other, will depend, in each case, upon the degree of use to which it may fairly be expected that the way will be subject. Thus it has been held that a city which opens a sidewalk to public travel is bound to keep every part of it in repair;³ and that if a city maintains a bridge as a part of the highway, it is its duty to see that every part of the bridge is kept safe for travellers.⁴ But, whatever may be the obligation of the municipality, as to the streets of a city or populous village, it is held, generally, that towns are not bound to keep their highways in suitable condition for travel in their whole width as laid out, and that their liability for accidents is limited to those which occur by reason of defects in the “worked” or travelled track. So if a traveller, without excuse or necessity, deviates from the travelled track, this being in a safe and suitable condition for travel, and by reason of his so doing, meets with an injury from some defect in the way, existing outside the track, the town will not be responsible.⁵ As to such portion of the way as the munic-

¹ *Jewhurst v. Syracuse*, 108 N. Y. 303. See *Harwood v. Oakham*, 152 Mass. 421.

² *Ray v. St. Paul*, 40 Minn. 458.

³ *Roe v. Kansas*, 100 Mo. 190; *Goeltz v. Ashland*, 75 Wis. 642.

⁴ *Walker v. Kansas*, 99 Mo. 647, overruling *Tritz v. Kansas*, 84 Mo. 632.

⁵ *Kelley v. Fond du Lac*, 31 Wis. 179; *Beall v. Athens*, 81 Mich. 536; *Howard v. North Bridgewater*, 16 Pick. 189; *Smith v. Wendell*, 7 Cush. 498; *Keith v. Easton*, 2 Allen, 552; *Moran v. Palmer*, 162 Mass. 196; *Tasker v. Farmingdale*, 85 Maine, 523; *Sykes v. Pawlet*, 43 Vt. 446; *Kling v. Kansas*, 27 Mo. App. 321. Where a horse took fright and brought the driver into collision with a blasted rock lying out of the

ipality has graded and improved, the ordinary obligations, of course, attach.¹ And although a town is not bound to work the whole width of the road where the travel does not require it, yet it has the right to control the whole width and is charged with a corresponding duty. Thus if it suffers objects to remain deposited on the untravelled part of the way, which, by their frightful appearance, make the road unsafe, the town will be responsible for resulting accidents ;² and the same rule is held as to obstructions, like logs, planks, or boards placed in the roadway, outside the travelled track, whether by the municipality or by a third person.³ And if a town permits a leading way to exist, within the location but outside the worked track, leading to a private way, and having the appearance of being a part of the highway, it is its duty to see such leading way kept safe.⁴ It is held that while a municipality is bound to see that the construction of a street railway does not necessarily endanger other uses of the street, it does not insure passengers against defects in the street-car system itself ; as where a passenger standing on the side-board of a car, came in contact with a trolley pole set in the gutter outside the travelled way, the location of the pole not having been exactly fixed by the municipality.⁵

§ 178. **Railings and Barriers.** — A municipality is bound to erect and maintain suitable railings, or other barriers, where a dangerous place exists in such close proximity to the highway as plainly to make the way unsafe for travellers exercising ordinary prudence and discretion.⁶ But it is not bound

wrought part of the highway, it was held that the municipality was not answerable. *Moulton v. Sanford*, 51 Maine, 127, and see *Perkins v. Fayette*, 68 Maine, 152 ; *Rice v. Montpelier*, 19 Vt. 470 ; § 170, *ante*, notes and cases cited.

¹ See *Triese v. St. Paul*, 36 Minn. 526.

² *Cassedy v. Stockbridge*, 21 Vt. 391 ; *Morse v. Richmond*, 41 Vt. 435.

³ *Snow v. Adams*, 1 Cush. 443, and see *Bigelow v. Weston*, 3 Pick. 267 ; *Frost v. Portland*, 11 Maine, 271 ; *French v. Brunswick*, 21 Maine, 29 ; *Slivitski v. Wien*, 93 Wis. 460.

⁴ *Stark v. Lancaster*, 57 N. H. 88.

⁵ *Kennedy v. Lansing*, 99 Mich. 518.

⁶ *Norris v. Litchfield*, 35 N. H. 271 ; *Davis v. Hill*, 41 N. H. 329 ; *Murphy v. Gloucester*, 105 Mass. 470 ; *Hayden v. Attleborough*, 7 Gray,

to protect travellers from straying out of the way when there is not any dangerous place contiguous thereto.¹ So railings are required only when some steep bank or other dangerous object or place exists so near the travelled road as to expose travellers to injury through some of the mischances incident to the ordinary use of the road, and reasonably to be anticipated from such user.² The municipality is not bound to anticipate and guard against extraordinary accidents. Thus where the plaintiff was injured by falling over an embankment at the edge of a street, and it appeared that the roadway was safe and in good condition, and was bounded by a curb eight inches high, and by ten feet of sidewalk, and it appeared that the plaintiff was dragged over the embankment by his horse becoming frightened and unmanageable at a place where no danger from the embankment was to be expected, it was held that the failure to guard the embankment was not negligence, and that it was not an "exposed place" within the meaning of a statute which gave the municipality power to compel the building and maintenance of railings at exposed places.³ So the fact that ice is likely to form and become slippery upon level ground contiguous to a highway will not impose upon the municipality the duty of fencing the highway at that point to protect travellers from the danger of slipping.⁴ When a highway containing a well-beaten track is discontinued, it is the duty of the municipality to give effectual notice

338; *Kelsey v. Glover*, 15 Vt. 708; *Gillespie v. Newburgh*, 54 N. Y. 468; *Baldwin v. Greenwood Turnpike Co.*, 40 Conn. 238; *Hey v. Philadelphia*, 9 Phila. 166; *Kenworthy v. Ironton*, 41 Wis. 647; *Bassett v. St. Joseph*, 53 Mo. 290; *Aurora v. Colshire*, 55 Ind. 484; *Nichols v. Brunswick*, 3 Cliff. 81.

¹ *Norwich v. Breed*, 30 Conn. 535; *Sparhawk v. Salem*, 1 Allen, 30; *Alger v. Lowell*, 3 Allen, 402; *Warner v. Holyoke*, 112 Mass. 362; *Puffer v. Orange*, 122 Mass. 389; *Logan v. New Bedford*, 157 Mass. 534.

² *Commonwealth v. Wilmington*, 105 Mass. 599, 601.

³ *Hubbell v. Yonkers*, 104 N. Y. 434. It was held not to be, as matter of law, negligence in the authorities of a small country village to construct a plank sidewalk eight feet wide, crossing a creek at a height above the water of three or four feet, for a distance of thirty-four feet, without side-rails, when but few persons usually travel over it. *Sandy Lake v. Forker*, 18 Atl. Rep. 609 (Penn. 1889).

⁴ *Damon v. Boston*, 149 Mass. 147. See §§ 181-183, *post*.

of such discontinuance, and to erect barriers to prevent travel over it.¹ When a municipality excavates a street for municipal purposes, it is bound to use reasonable care to protect travellers, and so to place barriers and lights at night; but it is not, ordinarily, bound to close the street in which the excavation is being made.² If barriers properly placed are removed without the fault of the municipality, and, before sufficient time elapses in which to discover their removal and to replace them, a traveller is thereby injured, the municipality will not be liable for such injury.³ The question of the necessity of a barrier is ordinarily for the jury;⁴ but where the risk is so small that it obviously would be unreasonable to require the municipality to provide a railing, it seems that the court may decide the question as one of law, and direct a verdict for the defendant.⁵

§ 179. **Closing Highway for Repairs : Lights : Waterworks. —**

If the corporation closes a highway, temporarily, against travel, for the purpose of repairing it, it is bound to see that it is in fact closed by suitable barriers; and if a traveller attempts to use a way imperfectly closed, and so is injured, the municipality may be liable.⁶ A municipality has no right to

¹ *Bills v. Kaukana*, 94 Wis. 310. Wires stretched across the ends of a defective bridge at the height of the breast of a horse, and signs "bridge unsafe" were held to be a sufficient warning, although the plaintiff could not read the English language. *Weiss v. Jones County*, 86 Iowa, 625.

² *O'Rourke v. Monroe*, 98 Mich. 520; *Doherty v. Waltham*, 4 Gray, 576; *Myers v. Springfield*, 112 Mass. 489. See *Chope v. Eureka*, 78 Cal. 588. It is said that the duty of a municipality to place danger signals at night is not relieved by the fact that the streets are lighted by electric lights. *Aurora v. Rockabrand*, 149 Ill. 399.

³ *Raymond v. Keseberg*, 91 Wis. 191.

⁴ *Lyman v. Amherst*, 107 Mass. 330; *Howard v. Mendon*, 117 Mass. 585; *Lutton v. Vernon*, 62 Conn. 1; *Ross v. Ionia*, 104 Mich. 320; *Gould v. Schirmer*, 101 Iowa, 582; *Mechesney v. Unity*, 164 Penn. St. 358; *Wellman v. Susquehanna Depot*, 167 Penn. St. 239; *Trexler v. Greenwich*, 168 Penn. St. 214.

⁵ *Scannal v. Cambridge*, 163 Mass. 91. See *Tisdale v. Bridgewater*, 167 Mass. 248.

⁶ *White v. Boston*, 122 Mass. 491, 494; *Ray v. Poplar Bluff*, 70 Mo App. 252.

erect a railing within a public way for the purpose of changing the line of travel, and if a traveller is injured by reason of such a railing, it is a question of fact whether the highway was thereby made defective.¹ As the laying of a railway track in a street renders necessary the obstruction of the street, it amounts to a nuisance unless properly guarded, and the fact that the work is being done by an independent contractor will not relieve the defendant railway company from liability for an accident caused by the work being improperly guarded.² The duty to guard excavations by lights and barriers cannot be shifted upon a contractor so as to relieve the municipality from its obligations.³ But the placing of such lights and barriers by a contractor or a private person may be a defence in behalf of the municipality in an action for injuries.⁴ A municipality is not bound, as matter of law, to light its streets, unless it is expressly required so to do by the statute.⁵ But as a street partially obstructed, or out of repair, and so dangerous, may be reasonably safe if lighted, the fact that it was or was not lighted may be material upon the question of negligence.⁶ And the same rule applies when the corporation omits to place lights to mark an excavation in the street, whether or not this is required by an ordinance.⁷ A municipality which maintains a system of water-works is liable for injuries caused by its negligence in permitting the surface of a highway, in which a water-box had been placed, to wear away so that the water-box projected above the surface of the street and obstructed it.⁸ And a town or city which,

¹ *Pratt v. Amherst*, 140 Mass. 167.

² *Woodman v. Metropolitan R. R.*, 149 Mass. 335.

³ *Baker v. Grand Rapids*, 111 Mich. 447.

⁴ *Walker v. Ann Arbor*, 111 Mich. 1.

⁵ *Canavan v. Oil City*, 183 Penn. St. 611; *Columbus v. Sims*, 94 Ga. 483. See *Cullom v. Justice*, 161 Ill. 372.

⁶ *Miller v. St. Paul*, 38 Minn. 134. It is error to instruct the jury that, as matter of law, it is not negligence to fail to light the streets at a certain crossing. *Jefferson v. Chapman*, 127 Ill. 438.

⁷ *Flater v. Fey*, 70 Mich. 644; *McAllister v. Albany*, 18 Or. 426, and see *Barton v. McDonald*, 81 Cal. 265.

⁸ *Wilkins v. Rutland*, 61 Vt. 336, and see *King v. Oshkosh*, 75 Wis. 517; *Hopkins v. Ogden*, 5 Utah, 390.

acting under the authority of a statute, lays and maintains water-pipes under its streets, for the purpose of supplying its inhabitants with water, at rates fixed by the municipality, may be liable, at common law, for an injury sustained by a traveller in a street which has been undermined by the escape of water from a pipe negligently laid, although, under the circumstances, the defendant would not be liable under the statute making municipal corporations liable for accidents arising from defective ways.¹ The rule laid down in this case is in accordance with the principle, already stated, that if a municipal corporation, acting under authority of law, do a thing or enter into an employment, from which it derives an advantage special to itself, it may be liable at common law for injuries caused to an individual by its doing the thing or exercising the employment negligently.² Upon this principle it was held that, as to that portion of a water system maintained by a municipality which was employed in supplying individuals with water, for hire, the municipality would be liable for any negligence in the construction or management.³

§ 180. **Objects overhanging the Highway : Sign-boards : Awnings.** — It is held that an object having no necessary connection with the road-bed, or relation to the travel thereon, and the danger from which arises merely from its casual proximity to the highway, will not, generally, make the way defective. Thus where a flag was suspended by a private person across the highway, from a rope attached at either end to the abutting buildings, and with weights at the lower corners, one of which became detached and fell upon and injured a traveller passing upon the highway beneath, it was held that the municipality was not liable for the injury, under a statute requiring it to keep its streets "in good and sufficient repair."⁴ But the court declined to establish the rule that a

¹ *Hand v. Brookline*, 126 Mass. 324.

² See § 58, *ante*, notes and cases cited.

³ *Wilkins v. Rutland*, 61 Vt. 336.

⁴ *Hewison v. New Haven*, 34 Conn. 136. As to the liability of the abutting owner for maintaining dangerous obstructions or objects upon the highway, see §§ 187-189, *post*, notes and cases cited.

way can be rendered defective only by something in or upon the road-bed itself; and, elsewhere, it has been held that a municipality was liable for injuries caused by the fall of a liberty pole which had become rotten, although it stood in a part of the way where it did not obstruct travel, the decision being placed upon the ground that the authorities were bound to remove dangerous nuisances from the public ways.¹ And it is held to be the duty of a municipality to supervise the adjustment and regulation of electric wires suspended over its streets and owned and maintained by a private party, and for any failure of duty in this respect by which a traveller suffers injury the municipality may be liable.² But it was held that a town was not responsible for injuries caused to a traveller by the falling of a sign suspended over the highway by the owner of an abutting building.³ The liability would seem to be clear when the object overhanging the way is wholly or in part supported by the highway. Thus it was held that a city might be liable for injuries caused by the fall of an awning erected by the owner of an abutting building and supported by posts which stood between the sidewalk and the part of the way intended for carriages, although the surface of the roadway was safe and convenient.⁴ So it was held that a show-board imperfectly constructed, on private property but partly supported by uprights nailed to the sidewalk, was a defect for the existence of which the municipality might be liable.⁵ And it would seem that the fact that the dangerous object which causes the accident was permitted to exist by

¹ *Norristown v. Moyer*, 67 Penn. St. 355.

² *Mooney v. Luzerne*, 186 Penn. St. 161.

³ *Taylor v. Peckham*, 8 R. I. 349.

⁴ *Hume v. Mayor of New York*, 74 N. Y. 264; *Drake v. Lowell*, 13 Met. 292. In *Hixon v. Lowell*, 13 Gray, 59, the court intimated that the limit of statutory construction as against the defendant was reached in the case last cited. But, later, the liability of the defendant was affirmed in a case similar to that of *Drake v. Lowell*, except that it did not appear that the awning was supported by posts or other fixtures resting in the highway. *Day v. Milford*, 5 Allen, 98, and see *Pedrick v. Bailey*, 12 Gray, 161; *Riley v. Simpson*, *Catts v. Simpson*, 83 Cal. 217; § 90, *ante*.

⁵ *Langan v. Atchison*, 35 Kan. 318. See *Carson v. Ottumwa*, 102 Iowa, 99.

the municipality contrary to law, or that its existence was a cause which, conjoined with another cause, illegally existing, produced the accident, may be evidence to charge the defendant municipality with liability for such an accident although the object in question was not supported upon the highway. Thus where a person was injured by the fall of a wooden awning which had been constructed in violation of a city ordinance, and had been suffered to remain for several years over a sidewalk in a street of the city, the awning not being securely supported and snow having been permitted to accumulate upon it and remain for such a length of time as to warrant an inference of notice, the city was held liable.¹

(a) *Ice and Snow.*

§ 181. **When the Liability of the Municipality for, attaches.** — It is the duty of a municipal corporation to keep its streets free from accumulations of snow and ice; but it may impose this duty on the abutting owners, and the corporation will not be charged with negligence if, observing that the work is being generally done, it awaits the action of the owners for a reasonable time. Nor is it negligence on the part of the corporation to fail to remove from its sidewalks ice formed suddenly, if it is practically impossible to remove it, nor to fail to compel the abutting owners to sprinkle the ice with ashes or sand; but the corporation has a right to await, for a reasonable time, a change of temperature which will remove the danger. But when a reasonable time has elapsed after the dangerous accumulation has formed, the corporation must either compel the abutting owners to act or act itself; and if it permits the danger to remain thereafter, having notice actual or constructive of its existence, it will

¹ *Bieling v. Brooklyn*, 120 N. Y. 99. In this case the court said: "It is quite likely that the manner of construction, its means of support, and inefficiency especially to bear the weight of snow permitted to gather and remain upon it, may have been ascertained by inspection; and it is so important for the safety of travel on the sidewalk of a public street in a city that structures of that character should be adequately secured, as to call upon the constituted authorities to exercise reasonable vigilance to see that they are so."

be responsible for the injuries resulting therefrom.¹ When the facts, or the conclusion to be drawn from them, is doubtful, the question as to what will be a reasonable time is for the jury.²

§ 182. **When a Defect.** — The mere fact without more, that the plaintiff slipped on the ice, and fell and was injured, is not enough to charge the municipality with responsibility for the accident.³ If a highway, well and properly constructed, becomes slippery from ice gathering or forming upon it, but not accumulating so as to form an obstruction to travel, except in so far as such slipperiness, of itself, forms an obstruction, the fact that a traveller may be liable to slip and fall thereon does not make such slipperiness a defect within the meaning of the statutes which impose upon municipal corporations the duty of keeping their ways safe and convenient for travellers.⁴ It is said, in New York, "the danger arising from the slipperiness of ice or snow lying in the streets, is one which is familiar to every one residing in our climate, and which every one is exposed to who has reason to traverse the streets of cities or villages in the winter season. Acci-

¹ *Taylor v. Yonkers*, 105 N. Y. 202; *Harrington v. Buffalo*, 121 N. Y. 147; *O'Connor v. New York*, 9 N. Y. Sup. N. E. Rep. 492 (1890); and see cases cited with § 182, *post*.

² *Keane v. Waterford*, 8 N. Y. Sup. N. E. Rep. 790 (1890).

³ *Slavin v. New York*, 56 N. Y. S. C. 604; *Kaveney v. Troy*, 108 N. Y. 571; *Kinney v. Troy*, 108 N. Y. 567.

⁴ *Stanton v. Springfield*, 12 Allen, 566; *Hutchins v. Boston*, 12 Allen, 571 n.; *Johnson v. Boston*, 12 Allen, 572 n.; *Nason v. Boston*, 14 Allen, 508; *Henkes v. Minneapolis*, 42 Minn. 530; *Gram v. Greenbush*, 3 N. Y. Sup. N. E. Rep. 76 (1889); *Chicago v. McGiven*, 78 Ill. 347, 352; *Broburg v. Des Moines*, 63 Iowa, 523; *Smyth v. Bangor*, 72 Maine, 249; *Bleakley v. Prescott*, 12 Ont. App. 637; *Ward v. Jefferson*, 24 Wis. 342; *Cook v. Milwaukee*, 24 Wis. 270; *Salzer v. Milwaukee*, 97 Wis. 471; *Chamberlain v. Oshkosh*, 84 Wis. 289; *Kannenburg v. Alpena*, 96 Mich. 53; *Rolf v. Greenville*, 102 Mich. 544; *Wyman v. Philadelphia*, 175 Penn. St. 117. The like rule was applied when the injury complained of was occasioned by the plaintiff's slipping upon a slab of glass set into the sidewalk for the purpose of lighting the area below; it being held that the city was not bound to have its sidewalks so constructed as to secure immunity from danger to travellers in the street; but only to see that these are kept reasonably safe. *Chicago v. McGiven*, 78 Ill. 347.

dents occurring from such causes are chargeable solely to the person injured, unless it can be shown that the cause thereof has been occasioned, aggravated, or negligently permitted by the act of some third party charged with the duty of removing it.”¹ But if, from any cause, the ice or snow upon the highway becomes piled into mounds or ridges, or assumes or is worn into a rough or uneven surface, or into dangerous holes or depressions, so that travellers passing over it are in danger of falling, then such snow or ice may constitute an obstacle to travel for the existence of which the municipality will be responsible.² It is generally a question of fact whether a way partly obstructed by snow or ice was safe and convenient,³ but, to authorize the submission of the case to the jury, there must be evidence that the injury was due to some defect which would not have existed if the way and ice had been perfectly smooth.⁴

¹ Per Ruger, C. J., in *Harrington v. Buffalo*, 121 N. Y. 147, 150.

² *Luther v. Worcester*, 97 Mass. 268; *Stone v. Hubbardston*, 100 Mass. 49; *Morse v. Boston*, 109 Mass. 446; *McAuley v. Boston*, 113 Mass. 503; *Williams v. Lawrence*, 113 Mass. 506 n.; *Chicago v. McGiven*, 78 Ill. 347; *Cook v. Milwaukee*, 24 Wis. 270; *Providence v. Clapp*, 17 How. 164, and see cases cited, *supra*.

³ *Street v. Holyoke*, 105 Mass. 82; *Gerald v. Boston*, 108 Mass. 580.

⁴ *Gilbert v. Roxbury*, 100 Mass. 185. Now, in Massachusetts, it is provided by statute that “No city or town shall be liable for any injury or damage to person or property hereafter received or suffered in or upon any part of a highway, town way, causeway, or bridge, by reason or in consequence of snow or ice thereon, if the place at which the injury or damage was received or suffered was at the time of the accident otherwise reasonably safe and convenient for travellers.” St. 1896, c. 540. This language is held to mean that a way shall not be deemed unsafe by reason of snow or ice thereon, if it would be reasonably safe and convenient for travellers but for the presence of snow and ice thereon. *Newton v. Worcester*, 169 Mass. 516. Under the Michigan statute making it the duty of townships to keep public highways “in reasonable repair, so that they will be reasonably safe and convenient for public travel” and to levy sums of money “to keep public highways . . . in good repair,” it is held that an intention to create a liability on the part of municipalities for injuries received by reason of the accumulation along the sides of the streets and at crossings of snow removed from the sidewalks for foot travel, and, in cases of deep snow, removed to clear a track in the streets for vehicles, which snow has been changed to ice, does not appear. *Hutchinson v. Ypsilanti*, 103 Mich. 12. The opinion is founded on the cases *McKellar*

§ 183. **Defect from, caused by Artificial Means.** — When there is no other defect than slipperiness, the rule is the same although the formation of the ice be partly due to artificial causes, as to the flow of water from a hose upon the sidewalk,¹ or water flowing from a gutter,² or where snow was carried upon the sidewalk in the course of ordinary travel, and there trodden down and frozen,³ or where there was an overflow of water from a tub or trough by the roadside, which froze upon the way,⁴ or in the common case of ice formed upon a sidewalk by the drippings from the adjoining buildings.⁵ But if the ice collected by artificial causes take the

v. Detroit, 57 Mich. 158, and *Rolf v. Greenville*, 102 Mich. 544, and the cases *Joslyn v. Detroit*, 74 Mich. 458, and *Hayes v. West Bay City*, 91 Mich. 418, are distinguished.

¹ *Henkes v. Minneapolis*, 42 Minn. 530.

² *Fitzgerald v. Woburn*, 109 Mass. 204; *Todd v. Troy*, 61 N. Y. 506; *Gavett v. Jackson*, 109 Mich. 408. See *Manross v. Oil City*, 178 Penn. St. 276.

³ *Nason v. Boston*, 14 Allen, 508.

⁴ *Stone v. Hubbardston*, 100 Mass. 49.

⁵ *Kinney v. Troy*, 108 N. Y. 567; *Kaveney v. Troy*, 108 N. Y. 571; *Harrigan v. Hoosick Falls*, 1 N. Y. Sup. N. E. Rep. 695 (1888); *Keane v. Waterford*, 2 N. Y. S. Rep. 182; *Tobey v. Hudson*, 2 N. Y. S. Rep. 180; *Hanson v. Warren*, 14 Atl. Rep. 405 (Penn. 1888); *Billings v. Worcester*, 102 Mass. 329. In the latter case, the question arose whether the same condition of a street or sidewalk, which, if produced from the operation of general causes, as by reason of atmospheric changes resulting in a slippery state of the surface, would not be a defect, might not be a defect if the ice was formed by some local cause such as water, dripping from the eaves of a building, or flowing from a gutter; and whether smooth ice, not broken into unevenness, might not under such circumstances become a defect. The majority of the court held that the distinction thus taken would not bear the test of scrutiny, and said: "If the injury happened by reason of that which was not in itself a defect, the town cannot be made liable, whatever may be the proof as to the manner in which the condition of the way became such as it was. The ground upon which it has been held that the mere fact that the surface of a well-constructed street or sidewalk is rendered smooth and slippery by moisture and frost does not constitute a defect is, that such a condition is so inevitable . . . that it cannot be supposed to have been the intention of the legislature to cast upon the towns a duty so impossible of performance, or a burden from which the highest degree of diligence could do so little to protect them. . . . The result . . . is, that the question of defect must be determined by the condition of the way itself in respect

form of a defect or obstruction to travel, and the municipality, after a reasonable time has elapsed, suffer it to remain in the street, it will become liable as in cases where the formation is due to the natural action of the elements.¹ And if the defective construction of the way at the particular point was the cause of the dangerous formation, the defendant may be liable even although the formation was smooth, and such as, had it been due to natural causes only, would not constitute a defect. Thus if water collects in a depression negligently allowed to remain in a sidewalk, and there freezes, this may be a defect for which the municipality will be liable.² It was held that a city was not bound to drain a lot of land under the surface of the street, nor to dam it so as to prevent the sidewalk from being overflowed.³

SECTION III.

OF NOTICE TO THE DEFENDANT.

§ 184. **Generally: Implied: When unnecessary: Illustrations.** — The statutes provide, generally, that the liability for accidents caused by defects in highways shall not attach unless the defendant municipality had notice of the existence of the defect complained of. Generally, the burden is upon the plaintiff to show that the corporation, by its proper officers, knew of the existence of the defect, or ought to have known of it, in season to have remedied it, and so have prevented

to that particular which is alleged to have caused the injury complained of; that the question of . . . fault or negligence, or the contrary, on the part of the town, is involved only in reference to that particular defect or condition complained of, and, even as to that, only to a very limited degree; that snow and ice in the streets, or upon sidewalks are not defects merely because they make it slippery."

¹ *Stone v. Hubbardston*, 100 Mass. 49; *Fitzgerald v. Woburn*, 109 Mass. 204; *Cook v. Milwaukee*, 24 Wis. 270; *West v. Eau Claire*, 89 Wis. 31; *Harrington v. Buffalo*, 121 N. Y. 147.

² *Spellman v. Chicopee*, 131 Mass. 443; *Ayres v. Hammondsport*, 7 N. Y. Sup. N. E. Rep. 174 (1889).

³ *Tracey v. Poughkeepsie*, 46 Hun, 569.

the injury.¹ When the statute requirement of notice is general in its terms, the time or manner of giving notice not being prescribed, it will be a question for the jury whether the defendant is to be taken as affected with notice,² and, in such cases, proof of constructive notice is sufficient.³ This may be inferred from the notoriety of the defect,⁴ or from its continuance during such a length of time as will justify the inference that the proper officers of the corporation knew or might have known of its existence.⁵ When the defect is the result of something negligently done in the construction of, or in or upon, the highway, by the defendant acting by its duly authorized agents, it is not necessary for the plaintiff to prove any notice whether actual or constructive.⁶ Thus where the

¹ *New York City v. Sheffield*, 4 Wall. 189; *Hanscom v. Boston*, 141 Mass. 242; *Stanton v. Salem*, 145 Mass. 476. The statutes requiring notice as a preliminary to the action are not unconstitutional. *McNally v. Cohoes*, 53 Hun, 202. Where the statute did not require notice, it was held that the plaintiff need not allege nor prove it. *Chapman v. Milton*, 31 W. Va. 384.

² *Troxel v. Vinton*, 77 Iowa, 90; *Harrington v. Buffalo*, 50 Hun, 601; 121 N. Y. 147; *Kunz v. Troy*, 104 N. Y. 344; *Duncan v. Buffalo*, 50 Hun, 600; *Schroth v. Prescott*, 68 Wis. 678; *Fortin v. Easthampton*, 145 Mass. 196.

³ *Reed v. Northfield*, 13 Pick. 94; *Morassy v. New York*, 54 N. Y. S. C. 432; *Valparaiso v. Donovan*, 44 N. W. Rep. 449 (Neb. 1890); *Moon v. Ionia*, 81 Mich. 635; *Sterling v. Merrill*, 25 Ill. App. 596, 124 Ill. 522; *Chicago v. Farrell*, 27 Ill. App. 526; *Wheaton v. Hadley*, 30 Ill. App. 564.

⁴ *Chase v. Lowell*, 151 Mass. 422. But it does not follow that a municipality may not be taken to be affected with notice merely because the defect is such as is not likely to attract the attention of passers-by. *Mitchell v. Plattsburg*, 33 Mo. App. 555. To the rule that if the defect is open and notorious, notice is to be presumed, see also *Allis v. Day*, 14 Minn. 518; *Bast v. Leonard*, 15 Minn. 312; *Cleveland v. St. Paul*, 18 Minn. 279; *Shartle v. Minneapolis*, 17 Minn. 245; *Lindholm v. St. Paul*, 19 Minn. 245; *Moore v. Minneapolis*, 19 Minn. 300; *Bieling v. Brooklyn*, 120 N. Y. 99.

⁵ *Schroth v. Prescott*, 68 Wis. 678; *Smalley v. Appleton*, 75 Wis. 18; *Hall v. Fond du Lac*, 42 Wis. 274; *Lincoln v. Smith*, 45 N. W. Rep. 41 (Neb. 1890); *Philadelphia v. Smith*, 23 W. N. C. 242; *Whitfield v. Meridian*, 66 Miss. 570; *Griffin v. Johnson*, 84 Ga. 279; *Atchison v. Rose*, 43 Kan. 605; *Squires v. Chillicothe*, 89 Mo. 226; *Fortin v. Easthampton*, 145 Mass. 196.

⁶ *Brooks v. Somerville*, 106 Mass. 271; *Hinckley v. Somerset*, 145

statute required three days to charge a city with liability for injuries caused by dangerous excavations in its streets, it was held that this provision had no application where an accident occurred by reason of the neglect of an alderman of the city to erect a barrier to guard an excavation, he seeing it and knowing its dangerous character.¹ So where the city left a dangerous obstruction in the nature of a nuisance in its street and the plaintiff was injured thereby, it was held that he might recover without regard to the question whether he had given the notice required by the statute in order to charge the defendant in case of accidents caused by defects in streets.² The rule was applied where the injury was caused by the negligent building of a sidewalk by the defendant,³ and where a corporation was guilty of extreme negligence in constructing an apron over a ditch.⁴ But the cases are to be distinguished in which, the defendant having once guarded the dangerous place by sufficient barriers, these are removed without its fault; for in such cases it must be shown, in order to charge the defendant, that it had notice, express or implied, of the removal.⁵ If a highway become suddenly defective by the action of the elements, the municipality is not liable for resulting injuries, unless it had notice of the fact, or sufficient time in which to become informed of it by the exercise of reasonable diligence, and opportunity to repair the defect.⁶ In the absence of actual notice, municipalities are liable only for such defects as are apparent, or indicated by appearances, or disclosed by the test of ordinary user.⁷ A municipality is bound to take notice of the decay of structures, such as wooden sidewalks or pavements, which are built of perishable mate-

Mass. 326; *Trappnell v. Red Oak Junction*, 76 Iowa, 744; *Denver v. Deane*, 10 Col. 375; *Houston v. Isaacs*, 68 Tex. 116; *Boone County v. Mutcher*, 137 Ind. 140.

¹ *Cantwell v. Appleton*, 71 Wis. 463.

² *Hughes v. Fond du Lac*, 73 Wis. 380.

³ *Peru v. French*, 55 Ill. 317; *Chicago v. Langlass*, 66 Ill. 361.

⁴ *Jefferson v. Chapman*, 127 Ill. 438.

⁵ *Doherty v. Waltham*, 4 Gray, 596; *Peru v. French*, 55 Ill. 317; *Chicago v. Langlass*, 66 Ill. 361; § 178, *ante*.

⁶ *Ward v. Jefferson*, 24 Wis. 342; *McGrail v. Kalamazoo*, 94 Mich. 52.

⁷ *Hembling v. Grand Rapids*, 99 Mich. 292.

rials and exposed to hard and constant use.¹ But if such structures were properly constructed the municipality will not be liable for injuries caused by their getting out of repair unless it had actual notice of the defect, or this had existed so long that the authorities, by the use of reasonable diligence, ought to have discovered it.² Where the authorities had actual notice that a bridge was defective, and had caused repairs to be made upon it, it was held that they were chargeable with notice of the fact that the timber in the bridge was decaying, and that it was their duty to have it thoroughly examined.³ If the negligence charged is in the original construction of a bridge, it is not necessary to prove notice.⁴ The lack of barriers and lights on a drawbridge in a city is an obvious defect, and for a resulting injury the municipality will be liable without notice.⁵ Where a decayed tree, being struck by a heavy truck, fell upon and injured the plaintiff, it was held that if the tree was dangerous, but appeared safe to outward observation, the defendant was not liable, and that the defendant was not bound to examine a hole which had existed on one side of the tree, although by so doing it would have discovered the decay.⁶ Where an obstruction consisted of dirt thrown upon a sidewalk one or two days before an accident, in the presence and with the acquiescence of the street superintendent, it was held that the question whether there had been sufficient time for its removal was for the jury.⁷ Notice to the municipality may be presumed from the long-continued accumulation of snow or ice in a street,⁸ and the falling of snow is, of itself, a circumstance to put the

¹ *Weightman v. Washington*, 1 Black, 39; *Farrell v. Oldtown*, 69 Maine, 72; *Barnes v. Newton*, 46 Iowa, 567; *Noble v. Richmond*, 31 Gratt. 271; *Barrett v. Hammond*, 87 Wis. 654.

² *Miller v. St. Paul*, 39 Minn. 134.

³ *Spaulding v. Sherman*, 75 Wis. 77. See *Shaw v. Sun Prairie*, 74 Wis. 105.

⁴ *Boone County v. Mutchler*, 137 Ind. 140.

⁵ *Stephani v. Manitowoc*, 89 Wis. 467.

⁶ *Gubasco v. New York*, 14 Daly, 559.

⁷ *Shook v. Cohoes*, 108 N. Y. 648.

⁸ *Noy v. Troy*, 3 N. Y. Sup. N. E. Rep. 679 (1889). See §§ 181-183, *ante*, and cases cited.

municipality on its guard.¹ But the corporation is entitled to a reasonable time within which to remove such accumulations, and it will not be charged with constructive notice until such time has elapsed.² It has been held that failure to remove the snow from a sidewalk for forty-eight hours after it had ceased to fall did not charge a city with implied notice that the sidewalk was slippery and dangerous.³ It is evident that the question of what is a reasonable time must generally depend upon the circumstances of the particular case.⁴ Notice of a defect is notice of that state of things which constitutes a defect, and the fact that the municipal authorities may think that it does not constitute a defect is not material.⁵ But a mere liability to become defective is not a defect; and where the statute required that the defect should have existed for twenty-four hours in order to charge the defendant, it was held error to charge the jury that although the defect must have existed for twenty-four hours, it might have been secret and not developed until the time of the accident.⁶ So notice of the existence of a cause outside the way which may produce a defect, is not a notice of a defect.⁷ But the liability will not be removed by the fact that the same defect has become greater during the twenty-four hours.⁸ It was held that a stone that had lain in the highway for twenty-four hours might be a defect, although its position might have been changed during that time by human agency; provided it had not ceased by the change to be the same defect.⁹ While it is

¹ *Foxworthy v. Hastings*, 25 Neb. 133.

² *Taylor v. Yonkers*, 105 N. Y. 202; *Springer v. Philadelphia*, 12 Atl. Rep. 490 (Penn. 1888).

³ *O'Connor v. New York*, 8 N. Y. Sup. N. E. Rep. 560 (1890), and see *Betts v. Gloversville*, 8 N. Y. Sup. N. E. Rep. 795 (1890).

⁴ See *Dittrich v. Detroit*, 98 Mich. 245; *Reed v. Detroit*, 99 Mich. 204; *Germaine v. Muskegon*, 105 Mich. 213.

⁵ *Hinckley v. Somerset*, 145 Mass. 326.

⁶ *Monies v. Lynn*, 124 Mass. 165.

⁷ *Billings v. Worcester*, 102 Mass. 329.

⁸ *Blood v. Hubbardston*, 121 Mass. 233.

⁹ *Maccarty v. Brookline*, 114 Mass. 527, and see *Winn v. Lowell*, 1 Allen, 177. If a city has given a license to a builder to pile his materials in the street, notice of the danger will be implied, as to the city, from the open and continuous neglect of the builder. *Magee v. Troy*, 48 Hun,

not material, as affecting the question of the liability of a municipality for maintaining a dangerous obstruction in its street, whether such obstruction was created by private or public agency,¹ the ordinary rules as to notice obtain in such cases,² and if the obstruction is created by a third party, the municipality must have notice in order to charge it.³

§ 185. **Notice to Defendant's Officers or Agents.** — Where the statutes provide that the defendant municipality may be liable for injuries caused by defects which have existed for a certain length of time, as twenty-four hours, or of the existence of which the corporation had, or ought to have had, actual knowledge, it is generally held that notice may be shown by proof that the proper officers of the defendant corporation,

383. If the danger has subsisted but a very short time, the city is not liable. *Warsaw v. Dunlap*, 112 Ind. 576. Where the statute provided that, in order to render the municipality liable for negligence in failing to keep a street in repair, such failure must have continued for ten days, at least, after notice in writing, it was held that the provision did not apply to a case where the municipality itself had caused an excavation to be dug by a contractor, and discharged the contractor, and allowed the excavation to remain as the contractor left it. *Houston v. Isaacs*, 68 Tex. 116, and see *Turner v. Newburgh*, 109 N. Y. 301. Knowledge of the defective condition of the sidewalks, generally, for the distance of one or two blocks each way from a street crossing, is held not to be a sufficient implied notice of the special defect which causes the injury. *Dundas v. Lansing*, 75 Mich. 499, *Morse, J.*, dissenting. And see *Shaw v. Sun Prairie*, 74 Wis. 105. If a municipality give notice to an abutter to repair a sidewalk, this is not, as matter of law, an admission of notice of any other defect than the one stated in the notice to the abutter, or of one so related to it that the existence of the latter may reasonably be inferred from that of the former. *Shelby v. Clagett*, 22 N. E. Rep. 407 (Ohio, 1889). The fact that a sidewalk was inspected by the proper officer a few weeks before the accident does not relieve the municipality from responsibility therefor. *Stebbins v. Oneida*, 5 N. Y. Sup. N. E. Rep. 483 (1889).

¹ *Pettengill v. Yonkers*, 116 N. Y. 553; *King v. Oshkosh*, 75 Wis. 517.

² *Lewis v. Atlanta*, 77 Ga. 756.

³ *Boulder v. Niles*, 9 Col. 415; *Kunz v. Troy*, 104 N. Y. 344; *Warsaw v. Dunlap*, 112 Ind. 576. An abutter has a right to use, temporarily, a reasonable part of the highway for the deposit of mortar-boxes to use in plastering his house; and the mere presence of such boxes in the highway is not constructive notice to the municipality that the abutter is making an unlawful use of the highway. *Loberg v. Amherst*, 87 Wis. 634.

whose duty it is to attend to municipal affairs, actually knew of it, or, by proper vigilance and care, might have known of it.¹ Upon the question of constructive notice, it is not material what municipal officer is actually charged with the duty of inspecting the streets.² Thus where the defect existed in a street patrolled by a policeman, and through which one of the selectmen of the defendant town had passed several times after the defect appeared, it was held that there was evidence of notice.³ So it was held that a police officer was, under the statute, an agent of the city, and that his knowledge of the existence of a defect was the knowledge of the city.⁴ But where the statute provided that a city should not be liable unless actual notice of the existence of the defect had been given to the common council or to the superintendent of streets twenty-four hours, at least, before the occurrence of the accident, it was held that, in order to charge the defendant, it was not sufficient to show that the superintendent of streets knew, or should have known, of the defect by personal observation.⁵ The granting of a permit to do a certain thing in the highway implies notice that the thing is being done, and the corporation may thereafter be liable for injuries caused by the doing of the work.⁶ Where the statute

¹ *Howe v. Lowell*, 101 Mass. 99; *Crosby v. Boston*, 118 Mass. 71; *Jaquish v. Ithaca*, 36 Wis. 108; *Parish v. Eden*, 62 Wis. 272; *Bloor v. Delafield*, 69 Wis. 273; *Platz v. McKean Township*, 178 Penn. St. 601; *Palestine v. Hassell*, 15 Tex. Civ. App. 519.

² *Masters v. Troy*, 57 N. Y. S. C. 485, and see *Quinlan v. Utica*, 74 N. Y. 603; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 469. A municipality is to be taken as affected with notice of the existence of a defect of which its officer, having the duty of seeing that the streets are in a safe condition, has actual notice. *Whitney v. Lowell*, 151 Mass. 212. But where the injuries were received by reason of the displacement of a cover of a man-hole, it was held that the fact that workmen were seen cleaning a sewer through the man-hole two days before the accident, did not prove notice to the city. *Ibid.* See, also, *Buck v. Biddeford*, 82 Me. 433.

³ *Fortin v. Easthampton*, 145 Mass. 196.

⁴ *Carrington v. St. Louis*, 89 Mo. 208. The rule may be different if the officer has not the power to remove the defect. See *Altwater v. Mayor of Baltimore*, 31 Md. 462.

⁵ *McNally v. Cohoes*, 60 N. Y. S. C. 202; but see *Dundas v. Lansing*, 75 Mich. 499; *Holmes v. Paris*, 75 Maine, 559, and other cases cited *infra*.

⁶ *District of Columbia v. Woodbury*, 136 U. S. 450. A municipality

provided an action for injuries received by reason of a defect which has existed for twenty-four hours "if" the defendant had reasonable notice of it,¹ it was held that if the defect had not existed for twenty-four hours the action could not be maintained, although the defendant had notice.² The statutes requiring specific notice are not unconstitutional.³ Where an officer of the defendant municipality, to whom an effectual notice of the existence of a defect may be given, himself creates the defect; as by placing an object, dangerous to travellers, within the travelled limits of the way; the statutory notice is unnecessary, since notice of a fact to a person who already knows the fact cannot be useful, and the municipality will be estopped from claiming the statutory notice, as for twenty-four hours.⁴

§ 186. **Notice in Writing.**—In many States, it is provided by statute that, in order to recover, the person injured shall

is liable for a defect caused by the excavations made by a contractor when the street has been opened to the public, and the defect has existed so long that the authorities, by the exercise of reasonable care, might have known of its existence. *Turner v. Newburgh*, 109 N. Y. 301, and see *Houston v. Isaacs*, 68 Tex. 116, as cited § 184, *ante*.

¹ Rev. Sts. Mass. c. 25, §§ 22.

² *Brady v. Lowell*, 3 Cush. 121. The statute, in Massachusetts, now provides that the defendant may be liable if the defect has existed for twenty-four hours, "or if" the defendant has notice of it. See Pub. Sts. Mass. c. 44, § 22.

³ *McNally v. Cohoes*, 60 N. Y. S. C. 202.

⁴ *Holmes v. Paris*, 75 Maine, 559. In this case, the action was brought under the statute of Maine, 1877, c. 206, which provides that, in order to charge the town with liability for an accident caused by a defect in a highway, certain officers of the town shall have twenty-four hours actual notice of the existence of the defect. Peters, C. J., said: "We incline to the opinion that the statute does not apply to a case such as this. In its literal terms it does; in its purpose and intent it does not. This particular provision of the statute was intended for another class of cases. Its purpose was to allow a town a reasonable opportunity to remove a defect after receiving information of its existence. . . . When the reason of the law ceases, the law ceases." See also *Buck v. Biddeford*, 82 Maine, 433; *Dillon*, 2 Mun. Corporations, § 1027, notes and cases cited; expressions in *Brooks v. Somerville*, 106 Mass. 271, and *Monies v. Lynn*, 117 Mass. 273; *Dundas v. Lansing*, 75 Mich. 499; *McNally v. Cohoes*, 60 N. Y. S. C. 202, as cited *supra*.

within a specified time give the defendant corporation notice in writing of the time, place, and cause of the injury for which damages are claimed. The construction of each statute will depend upon its terms, but it may be said generally that such statutes are not to be construed with technical strictness, and that slight and immaterial errors are not to defeat the plaintiff's right to a recovery. It will be sufficient if the notice gives to the officers of the municipality information, with substantial certainty as to the time and place of the injury, and as to the character and nature of the defect which caused it, so as to be of aid to them in investigating the question of liability.¹ If there is no intention to mislead, and the defendant is not in fact misled by the form of notice, this will usually be sufficient, and whether the notice was misleading or not is generally a question for the jury;² but where the facts are undisputed, the question of the sufficiency of the notice is for the court.³ Where a statute was passed providing that actions for personal injuries by reason of defects in highways should not be maintained unless certain notices were given to the authorities within six months after the occurrence of the accident, it was held that the statute had no application to actions begun within six months after the passage of the act by the usual form of summons and complaint.⁴

¹ *Harder v. Minneapolis*, 40 Minn. 446; *Nichols v. Minneapolis*, 30 Minn. 545; *La Crosse v. Melrose*, 22 Wis. 459; *Spellman v. Chicopee*, 131 Mass. 443; *Canterbury v. Boston*, 141 Mass. 215; *Fortin v. Easthampton*, 142 Mass. 486; *Masters v. Troy*, 57 N. Y. S. C. 485. Thus, in the latter case, the written notice stated that the plaintiff had been injured by falling on the sidewalk "near" the corner of certain streets, and the proof showed that the accident occurred at a point sixty-five feet distant from said corner. It was held that this was not a material discrepancy.

² *Liffin v. Beverly*, 145 Mass. 549; *Young v. Douglas*, 157 Mass. 383; *Veno v. Waltham*, 158 Mass. 279; *Connors v. Lowell*, 158 Mass. 336; *Higgins v. N. Andover*, 168 Mass. 251.

³ *Owen v. Fort Dodge*, 98 Iowa, 281.

⁴ *Meyer v. New York*, 14 Daly, 395.

NOTE.—AS TO FORMS OF WRITTEN NOTICE. A notice of an injury is sufficient although it misnames a street, if it directs the proper authorities, unmistakably, to the exact place of the accident. *Hein v. Fairchild*, 87

Wis. 258; *Fuller v. Hyde Park*, 162 Mass. 51. But a notice that the walk "from the school-house to the village" which included the walk on which the accident occurred, was held insufficient. *Strudgeon v. Sand Beach*, 107 Mich. 496. The simple allegation that a way or sidewalk is "defective" is insufficient, *Van Loan v. Lake Mills*, 88 Wis. 430; *Gardner v. Weymouth*, 155 Mass. 595; *Madden v. Springfield*, 131 Mass. 441; but where the allegation was that the sidewalk was "unsound, defective, and dangerous," this was held to be sufficient, the walk being, in fact, rotten. *Van Frachen v. Fort Howard*, 88 Wis. 570. A notice under the Pub. Sts. Mass. c. 52, sec. 17, stating that a person has been injured by a defect in a highway, the defect and cause of the injury being "large stones extending about six feet into the travelled part of said way, . . . piled within the travelled way in such grotesque and unusual shape that they constituted a nuisance by their liability to frighten horses" was held insufficient to support an action for personal injuries caused by a collision with the pile of stones, in the absence of evidence, as required by the statute in cases of defective notice, that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby. *Bowes v. Boston*, 155 Mass. 344. But a notice to a town which averred that the plaintiff "was thrown from her carriage, caused by a defect in the road" was held to be sufficient under St. 1888, c. 114, there being no intention to mislead, and the town not being misled thereby. *Carberry v. Sharon*, 166 Mass. 32. It is not necessary that the notice should allege in express terms that it is signed in behalf of the plaintiff, if that fact is clearly to be gathered from the tenor of the notice. *Ibid.* Where the statute provided that in case the injured person was unable by reason of mental or physical incapacity to give the notice within the prescribed time, he might give such notice within ten days after the incapacity was removed, it was held that he could not avail himself of the ten days if his physical and mental capacity would have enabled him, within the prescribed time, to procure another to give the notice in his behalf, even although he could not give it personally. *Mitchell v. Worcester*, 129 Mass. 525; *McNulty v. Cambridge*, 130 Mass. 275; *May v. Boston*, 150 Mass. 517; *Saunders v. Boston*, 167 Mass. 595, and see *Barclay v. Boston*, 167 Mass. 596. Under the Connecticut statute (Gen Sts. § 2673), providing that no action for a highway injury shall be maintained unless written notice be given "of the time and place of its occurrence," where an accident occurred on May 2, but the notice, which was otherwise correct, stated that it occurred on May 5, this was held to be a fatal defect, although the defendant was not misled thereby. *Gardner v. New London*, 63 Conn. 267.

SECTION IV.

LIABILITY OF ABUTTING OWNERS.

§ 187. **General Liability: As to Ways by Dedication.** — The owner or occupant of premises abutting upon the highway who creates, or permits to exist, within the limits of the highway, a dangerous obstruction to travel, or who maintains upon his own premises, unnecessarily, something manifestly dangerous to travellers on the way, is liable for injuries thereby caused to travellers.¹ This rule has been held as to one who allowed a private passageway opening into his basement within the limits of the way to become dangerous;² and so where the abutter maintained a dangerous coal-hole in the sidewalk in front of his premises,³ or a vault in the sidewalk with a defective cover,⁴ or an area way insufficiently guarded,⁵ or basement steps in a dangerous condition.⁶ So where the abutter negligently permitted the ruinous wall of his building adjoining the highway to stand after the rest of the building had been destroyed by fire, he was held responsible for injuries caused to travellers by its falling into the street.⁷ If an abutter lays out and paves a sidewalk on his own land adjoining the public way and allows it to remain apparently a part of the way, he extends an implied invitation to the public to use it as such, and is bound to keep it safe for travel.⁸ But

¹ *Baltimore & Ohio R. R. v. Rose*, 65 Md. 585; *Carlin v. Driscoll*, 50 N. J. L. 28.

² *Landrue v. Lund*, 38 Minn. 538.

³ *Jennings v. Van Schaick*, 108 N. Y. 530. So maintaining an open hatchway in the sidewalk is negligence. *Engel v. Smith*, 82 Mich. 1; *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219.

⁴ *Morris v. Woodburn*, 57 Ohio St. 330.

⁵ *Hotel Association v. Walters*, 23 Neb. 280.

⁶ *Wasson v. Pettit*, 49 Hun, 166. Building a toboggan slide across a principal street in a populous city is in itself negligence. *Haden v. Clarke*, 10 N. Y. Sup. N. E. Rep. 291 (1890).

⁷ *Church of the Ascension v. Buckhart*, 3 Hill, 193; *Croghan v. Pope Iron & Metal Co.*, 87 Mo. 321.

⁸ *Holmes v. Drew*, 151 Mass. 578. It was held, where one built a walk leading from the street to his opera-house, and beyond that to

the abutter has a right to protect his property by reasonable means, as by walls and fences, and will not be liable if, by reason of the existence of these, a traveller is accidentally injured.¹ Where the statutes provide for notice to the municipality in order to charge it with responsibility for highway accidents, and such an accident occurs by the negligence of an abutting owner, so that both the owner and the municipality are liable therefor, the private owner cannot claim the benefit of such notice,² and, the liability of the abutter being ordinarily a common-law liability existing independent of the statute, he is to be taken as affected with constructive notice of the condition of things which causes the accident.³ The ordinary rule of liability is applied when the negligence complained of is that of the abutter's servants,

another street, and permitted the public to use it, that he was bound to keep it in a reasonably safe condition for travel; and that he was negligent in leaving an open area in it guarded only by a railing nineteen inches high. *Breeze v. Powers*, 80 Mich. 172. Where a person was injured by slipping on the ice on a private sidewalk in front of a business block, it was held that the owner of the block was not liable for failure to maintain a railing to keep people upon the public highway running in the same general direction. *Knowlton v. Pittsfield*, 62 N. H. 535. The owner of a lot bounded by a city street, which street has been cut down by the city thirty-eight feet below the surface of the lot, is not bound to guard the edge of his lot to prevent persons from falling therefrom into the street. *Woods v. Lloyd*, 16 Atl. Rep. 43 (Penn. 1888).

¹ *Bennett v. Kelly*, 132 Penn. St. 218. An owner of real estate who keeps the same in a reasonably safe condition, is not liable to a passer-by on the street who is injured by the falling of a fence during a storm so severe as to unroof houses and do other like damage. *Norling v. Allee*, 10 N. Y. Sup. N. E. Rep. 97 (1890).

² *Fisher v. Cushing*, 134 Mass. 374 ; *Holmes v. Drew*, 151 Mass. 578 ; *Stevenson v. Joy*, 152 Mass. 45.

³ So to make the defendants liable for an injury received by stepping into a coal-hole in a sidewalk in front of the defendant's premises and used by him, it is not necessary that the defendant should have had actual notice of the existence of the defect, or that this should have been notorious. *Dickson v. Hollister*, 123 Penn. St. 421. Nor is it necessary that the abutter should know that his fence is in a dangerous condition in order to render him liable. *Hussey v. Ryan*, 64 Md. 426. The owner of a building may be responsible for the safety of an awning which extends along the front of the building for the convenience of the tenants of the owner. *Milford v. Holbrook*, 9 Allen, 17.

agents, or employees.¹ It has been held that any continuous obstruction which renders a highway, or any part of it, less commodious, is a nuisance;² but the rule is perhaps stated too broadly. But the ruined wall of a house which had been burned standing close to the sidewalk in a city, was held to be a public nuisance for the existence of which the city was liable, the wall being dangerous.³ A street railway company is responsible for injuries caused by removing snow and so piling it in the street as to constitute a dangerous obstruction to travel.⁴ It is held that, in the absence of any statute regulation to the contrary, a tree planted by a private person on the sidewalk of a street in front of his premises belongs to, and is under the control of, the owner and occupant of such abutting property, who is bound to use reasonable care to prevent its becoming dangerous to passers-by; and, further, that if the owner's title extends to the middle of the street he is affected with notice that he is the owner of such tree and liable for injuries caused by its becoming dangerous.⁵ It seems that the general rule of liability is relaxed in favor of persons creating public ways by dedication, as to defects existing before the dedication. Thus it was held that if a highway is dedicated to the public with a dangerous obstruction thereon, such as would have been a nuisance if placed upon an ancient way, as a flight of steps, or a projecting flap, no action can be maintained for an injury caused thereby, as against the person so dedicating the way. So an action will

¹ See §§ 33 *et seq.*, *ante*. The defendant was erecting a house upon his wife's land for her, he having entire control of the work. One of his teamsters, without the defendant's consent, but with his subsequent acquiescence, took up the sidewalk in front of the lot for the purpose of more conveniently driving in, and, ruts becoming worn in the ground, the plaintiff fell into them and was injured. It was held that the defendant was guilty of an act of misfeasance for which he was liable to the plaintiff, and not merely for non-feasance. *Ellis v. McNaughton*, 76 Mich. 237, but see *Ster v. Tuety*, 45 Hun, 49.

² See *Iveson v. Moore*, 1 Ld. Raymond, 486; *Davis v. Mayor of New York*, 14 N. Y. 506, opinion by Denio, J.

³ *Parker v. Macon*, 39 Ga. 725; and see *Hardy v. Keene*, 52 N. H. 370; *Savannah v. Waldner*, 49 Ga. 324.

⁴ *McDonald v. Toledo, &c. Railway*, 43 U. S. App. 79.

⁵ *Weller v. McCormick*, 19 Atl. Rep. 1101 (N. J. 1890).

not lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before and at the time of the dedication, for an injury caused by the giving way of the covering of the area, in consequence of the wear and tear of public use.¹ By a broad application of the same principle, it has been held that, in the absence of a statute imposing upon a landowner the duty of constructing and maintaining a sidewalk in front of his premises, he is under no legal obligation to maintain such a sidewalk, and, further, that he will not be liable in damages for personal injuries sustained by a foot-passenger on account of the narrowness of such a walk laid out by him, or of its defective condition;² but it is apprehended that an abutting owner so maintaining a walk will clearly be liable for hidden defects or dangers therein, since he must be taken to hold out an invitation to the public to use the walk, and so to be liable in the same manner as if the walk were laid out upon his own land.³ It is held that a city charter making it the duty of the city to keep a sidewalk in repair at the expense of the abutter, in case the latter fails to do so, does not make the abutter primarily liable for injuries caused by a failure to keep the sidewalk in repair.⁴

§ 188. **Liability for Acts of Third Persons.** — It has already been stated that the owner or occupant of property who maintains, or permits to exist upon his property, a public or common nuisance⁵ will be responsible for injuries resulting therefrom to third parties, whether such nuisance be the result of his own act or of that of his servant or agent, or of an independent contractor employed by the owner.⁶ So, it

¹ *Robbins v. Jones*, 15 C. B. (N. S.) 221.

² *Fletcher v. Scotten*, 74 Mich. 212. The defect complained of in this case consisted in the slippery condition of the walk from the presence thereon of snow and ice. See *Cooper v. Waterloo*, 88 Wis. 433.

³ See §§ 66, 67, 70, *ante*, notes and cases cited, and also *Holmes v. Drew*, 151 Mass. 578; *Brezee v. Powers*, 80 Mich. 172; *Knowlton v. Pittsfield*, 62 N. H. 535.

⁴ *Fife v. Oshkosh*, 89 Wis. 540; *Sommers v. Marshfield*, 90 Wis. 59.

⁵ See §§ 187, *ante*, 189, *post*, notes and cases cited.

⁶ See § 39, *ante*, and cases cited.

being the duty of an abutter upon a public highway to see that travellers in the way do not suffer injury from the defective or dangerous condition of his premises, he will be responsible for such injuries although they were the result of the unauthorized or wrongful act of a third person, if he knows or ought to have known that the dangerous condition existed. Thus if a building is rendered unsafe by the acts of trespassers, which the owner might have prevented, and a traveller in the adjoining way thereby suffers injury, the owner is answerable;¹ as where a telegraph company, without the permission of the owner of a building, attached its wires to the chimney of a building abutting on a street, and the chimney was thereby dragged down, and fell upon and injured a traveller in the street, the owner was held to be liable; he being charged with constructive notice of the act of the telegraph company.² And, generally, it is the duty of the abutter to guard against dangers to which travellers in the street may be exposed from anything likely to fall from the roof of a house to the sidewalk, whether the unsafe condition be caused by the act of the abutter or of another.³ But if the act of the third person which causes the accident was done without the knowledge or consent of the owner of the building, and he is not affected with actual or constructive notice of the dangerous condition, nor chargeable with any antecedent negligence, he is not responsible. Thus where a traveller in the street was injured by the falling upon him of the stone coping of a chimney, and it appeared that the chimney was well and

¹ *Tucker v. Illinois Central R. R.*, 42 La. Ann. 114. It is said in this case that when a building falls, the mere fact of its falling is *prima facie* evidence of negligence in the owner, and gives rise to the maxim *res ipsa loquitur*. This doctrine is said to be common alike to the civil and the common law. See *Vincett v. Cook*, 11 N. Y. S. C. 318; *Mullen v. St. John*, 57 N. Y. 567; *Marcadé*, Vol. v., p. 273; *Laurent*, Vol. xx., p. 695, n., 642; § 111 *a*, *ante*, and notes.

² *Gray v. Boston Gas Light Co.*, 114 Mass. 149.

³ *Coupland v. Hardingham*, 3 Camp. 398. See *Welfare v. London & Brighton Railway*, 4 Q. B. 693; *Kearney v. London, Brighton, &c. Railway*, 6 Q. B. 759; *Hadley v. Taylor*, 1 C. P. 53. One who keeps a lamp attached to his premises and suspended over the highway is bound to see that it is kept in a safe condition, although the duty of attending to it is committed to an independent contractor. *Tarry v. Ashton*, 1 Q. B. D. 314.

properly constructed, and that the fall of the coping was caused by the act of a third person while using it improperly and without the knowledge or authority of the owner of the building, it was held that the owner was not answerable for the injury.¹ The general rule is applied although the contributing cause which joins with the negligence of the owner to produce the injurious result be casual or not to be expected. Thus the owner of land which adjoins a public street in a city who suffers a building to remain thereon in an unsafe or dilapidated condition, is liable to one who while passing along the street is injured by the falling of the wall of such building, although the fall of the wall may have been caused by a storm of unusual violence.² And the owner is bound to keep the premises safe against the effect of ordinary winds and storms.³

§ 189. *As to Excavations.* — The rule is definitely established in England, and is supported by the great weight of authority in the United States, that if one dig a pit or excavation in his land so near the public highway as to endanger travellers passing over it, he is responsible for injuries thereby caused, as for a public nuisance. In such a case, Maule, J., said: "It appears to us after much consideration, that the defendant, in having made the excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public, is, in effect, as much impeded as in the case of an ordinary nuisance to a highway."⁴ But, in order to constitute a public nuisance,

¹ *Scullin v. Dolan*, 4 Daly, 163.

² *Vincett v. Cook*, 11 N. Y. S. C. 318.

³ See *Benson v. Suarez*, 43 Barb. 408.

⁴ *Barnes v. Ward*, 9 C. B. 392 (1850); and see *Hadley v. Taylor*, L. R. 1 C. P. 53; *Fisher v. Prowse*, 2 B. & S. 770; *Beck v. Carter*, 68 N. Y. 283; *Bond v. Smith*, 44 Hun, 219; *Murray v. McShane*, 52 Md. 217; *State v. Society, &c.*, 42 N. J. L. 504; *Homan v. Stanley*, 66 Penn. St. 464; *Stratton v. Staples*, 59 Maine, 94; *Norwich v. Breed*, 30 Conn. 535; *Haughey v. Hart*, 62 Iowa, 96; *Young v. Harvey*, 16 Ind. 314; *Hutson v. King*, 95 Ga. 272; *Lepnick v. Gaddis*, 72 Miss. 200; *Hayes v. Michigan*

the excavation must adjoin the highway, otherwise whoever uses the land between the highway and the excavation does so at his own peril, either as being a trespasser, or, if the user be by permission, but without inducement, as a licensee.¹ And the owner of land is not bound to fence in an excavation therein, unless this be made so near the way as to constitute a nuisance.² It has been held that, when the owner makes an excavation on his land at such a distance from the way that a person falling into it must necessarily be a trespasser upon the land before reaching it, the owner is not responsible for the injury thus sustained:³ but it is apprehended that the real question in every case is whether the excavation is so near the way as to constitute a danger to the public and so become a nuisance, and that if it be a nuisance, it is immaterial, as to the cause of action, whether the plaintiff be technically a trespasser or not. The question whether an excavation adjoining a highway is dangerous may, when the

Central R. R., 111 U. S. 228. In Massachusetts, where the defendant made an excavation in his own land within a foot or two of the way and placed no guards to prevent travellers from falling into it, and one passing in the night fell into it and was injured, it was held that he could not recover, since the defendant owed him no duty and was not to be charged with negligence as to him. *Howland v. Vincent*, 10 Met. 371, and see *McIntire v. Roberts*, 149 Mass. 450, where it is said that it is not decided in Massachusetts, that at common law, abutters are liable for injuries received in consequence of excavations made in their land outside the limits of the highway; the courts in that State not recognizing the ground on which the cases in England, and other States rest, that such an excavation may constitute a public nuisance. In the same case it was held not negligence to maintain an opening to an elevator shaft facing on a public street, but separated from it by a lintel three inches high and eighteen inches wide.

¹ *Hardcastle v. South Yorkshire Railway*, 4 H. & N. 67; *Binks v. South Yorkshire Railway*, 32 L. J. R. (Q. B.) 26; *Murphy v. Brooklyn*, 118 N. Y. 575.

² *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Hardcastle v. South Yorkshire Railway*, 4 H. & N. 67; *Blundell v. Catterall*, 5 B. & Ald. 315; *Jordin v. Crump*, 8 M. & W. 782; *Blithe v. Topham*, Cro. Jac. 168; *Beck v. Carter*, 68 N. Y. 283. See *Wells v. Howell*, 19 J. R. 385; *Stafford v. Ingersoll*, 3 Hill, 38. So as to obstructions, as logs, &c., placed upon the land. *Deane v. Clayton*, 7 Taunt. 522.

³ *Grumlich v. Wurst*, 86 Penn. St. 74, and see *Kohn v. Lovett*, 44 Ga. 251.

facts are clear and undisputed, be one of law; as where there is nothing in the evidence to warrant the conclusion that the excavation constituted a nuisance;¹ but it is apprehended that ordinarily it is a question of fact for the jury to determine.²

SECTION V.

RESPECTIVE DUTIES AND LIABILITIES OF MUNICIPALITY AND THIRD PARTIES.

§ 190. **General Rule.** — It being the duty of the municipality to see that its ways are kept safe and convenient, its responsibility in this respect is not removed by the fact that a third person is legally bound to keep the way in repair, and if a traveller is injured by a defect in such a way he may generally look in the first instance to the municipality for damages.³ Thus the lessee of a part of a building, having no duty as to the proper condition of the sidewalk in front of it, may recover damages, as against the municipality, for injuries caused by a defect in the sidewalk which the owner of the building was bound to keep in repair,⁴ and a water company

¹ See *Bond v. Smith*, 113 N. Y. 378.

² See *Crogan v. Schiele*, 53 Conn. 186.

³ *Hale v. Railway Co.*, 6 H. & N. 497; *Ellis v. Gas Cons. Co.*, 3 El. & Bl. 767; *Newton v. Ellis*, 5 El. & Bl. 115; *Buffalo v. Holloway*, 7 N. Y. 493; *Storrs v. Utica*, 17 N. Y. 104; *Brooklyn v. Brooklyn City R. R.*, 47 N. Y. 475; *Rochester v. Montgomery*, 72 N. Y. 65; *Lowell v. Boston & Lowell R. R.*, 23 Pick. 24; *Woburn v. Henshaw*, 101 Mass. 193; *Boston v. Worthington*, 10 Gray, 496; *McDonald v. Toledo, &c. Railway*, 43 U. S. App. 79. The fact that the municipality has given the abutter a license to obstruct the way, as by piling building material in the street, does not relieve it from its duty to keep the street in a safe condition. *Brusso v. Buffalo*, 90 N. Y. 679; *Grant v. Stillwater*, 35 Minn. 242. Where the liability for injuries is imposed upon the city by statute, it continues as to a street being paved which remains open to travel, although the work is being done by an independent contractor as expressly required by statute, the city having power to exact indemnity for the contractor's negligence, and to reserve supervision of the work *Southwell v. Detroit*, 74 Mich. 438.

⁴ *Burt v. Boston*, 122 Mass. 223.

that discharges water on the street so as to render it unsafe, by reason of ice forming, is jointly liable with the municipality.¹ So where an independent contractor, in performing his contract with the municipality, makes holes or excavations in the street, and by reason of his negligence a traveller is injured, the municipality may be made responsible in the first instance.² Where railroad corporations, in exercising the power conferred upon them by statute to cut through and alter highways, create a dangerous defect or obstruction in the way, the town in which the way is situated is primarily liable for injuries caused to a traveller thereby.³ The question in all cases is whether the municipality has the right and power to interfere so as to prevent what is being negligently done, and if it has not such right and power, then it is not responsible.⁴ The duty to keep the highway clear of obstructions to travel does not include the power to enter upon the land of abutting owners to erect barriers or remove, or prevent the use of, structures or buildings.⁵ But the general

¹ *Waltemeyer v. Kansas City*, 71 Mo. App. 354.

² *Robbins v. Chicago*, 4 Wall. 657, and see *Chicago v. Robbins*, 2 Black, 418; *Omaha v. Jensen*, 35 Neb. 68.

³ *Willard v. Newbury*, 22 Vt. 458; *State v. Gorham*, 37 Maine, 451; *Veazie v. Penobscot R. R.*, 49 Maine, 123; *Currier v. Lowell*, 16 Pick. 170. So a town or city may be liable in the first instance for a defect in its highway caused by the negligence of a street railway corporation occupying a portion of the way. *Prentiss v. Boston*, 112 Mass. 43; *Hawks v. Northampton*, 116 Mass. 420; *Bailey v. Boston*, 116 Mass. 423, n. In Indiana, it is held that the fact that a city, by an ordinance granting the use of its streets to a street railway company, required the company to lay and maintain its track in a specified manner, does not render the city liable for the negligence of the company, although the company may not have conformed to the ordinance. *Michigan City v. Boeckling*, 122 Ind. 39.

⁴ *Jones v. Waltham*, 4 Cush. 299. In this case, it was held that a town was not liable for an injury received by a traveller by falling into a cattle-guard at a crossing; the town having provided barriers to prevent accidents, as far as this could be done without interfering with the passing of trains over the railroad. See also *Sawyer v. Northfield*, 7 Cush. 490; *Vinal v. Dorchester*, 7 Gray, 421; *Scanlan v. Boston*, 140 Mass. 84.

⁵ *Goodin v. Des Moines*, 55 Iowa, 67; *Haines v. Barclay Township*, 181 Penn. St. 521. The statute in Wisconsin, c. 471, Laws of 1889, provides that a city may be sued in the same action with the person primarily

liability will not be limited by mere implication.¹ On the other hand, an abutter is not liable for a defect in a way, unless the duty to keep it in repair is imposed on him by statute or contract.² Ordinarily, when the accident is due to the active negligence of the third party, the injured person may have his option to sue, in the first instance, either the third party or the municipality.³ So one who has contracted to build a sewer in a city, and to save the city harmless from suits arising from negligence in guarding the work, may be liable to a person injured in consequence of such neglect.⁴ Where the statute provides that abutters, or persons placing obstructions in the highway, shall be, in the first instance, liable for damages for injuries resulting from such sidewalks or obstructions; in order to a recovery against the municipality, the plaintiff must show that he has exhausted all remedies against the abutter or person causing obstructions.⁵ Where it was provided by a municipal charter⁶ that, whenever the city should be made liable to an action for damages by reason of the negligence of any person or corporation, such person or corporation should also be liable to an action on the same account by the injured party; it was held that the latter, on bringing action for such injury against the city, should join such other person or corporation as defendant, and that no judgment should be rendered against the city, unless judgment was rendered against such other person or corporation.⁷

§ 191. **Remedy over in Favor of the Municipality.** — When a municipal corporation is compelled to pay a judgment obtained against it in an action for injuries received by reason

liable for an injury resulting from a defective street. See *Raymond v. Keseberg*, 91 Wis. 191.

¹ *Davis v. Leominster*, 1 Allen, 182; *Pollard v. Woburn*, 104 Mass. 84.

² *Fulton v. Tucker*, 3 Hun, 529.

³ See *Barton v. McDonald*, 81 Cal. 265.

⁴ *Charlock v. Freeland*, 50 Hun, 395.

⁵ *Raymond v. Sheboygan*, 70 Wis. 318; *Hiner v. Fond du Lac*, 71 Wis. 74. See also *Clark v. Austin*, 38 Minn. 487; *Detroit v. Chaffee*, 68 Mich. 635.

⁶ 2 Rev. Sts. Missouri, p. 1626.

⁷ See *Norton v. St. Louis*, 97 Mo. 537.

of some defect in its ways occasioned by the negligence of a third person, it may, ordinarily, recover of such third person the amount so paid.¹ In such cases, the municipality and the person whose negligence directly causes the injury are not *in pari delicto*; and, when the negligence of the municipality is constructive merely, the rule that one wrong-doer cannot recover damages against the other for an injury caused by their joint offence does not apply.² And it seems that the right of action survives, in favor of the municipality, against the personal representatives of the negligent third person.³ The damages in such a case cannot exceed the damages recovered against the municipality, and are not to include double damages which have been recovered under the provisions of a statute.⁴ It would seem that ordinarily the municipality will be permitted to recover ordinary costs of suit as against the negligent third party.⁵ The rule in these cases may be said to rest upon the principle, which seems to be settled at common law by the weight of modern authority, that where the act complained of is, legally speaking, although not of necessity in fact, the act of several wrong-doers, such act not being wanton, malicious, or wilfully wrong, one of such wrong-

¹ *Lowell v. Boston & Lowell R. R.*, 23 Pick. 24; *Lowell v. Short*, 4 Cush. 275; *Lowell v. Spaulding*, 4 Cush. 277; *Stoughton v. Porter*, 13 Allen, 91; *Lowell v. Glidden*, 159 Mass. 317; *Troy v. Troy & Lansing R. R. R.*, 49 N. Y. 657; *Rochester v. Montgomery*, 72 N. Y. 65; *New York v. Dimick*, 20 Abb. N. C. 15, 49 Hun, 241; *Chicago v. Robbins*, 2 Black, 418; *Duxbury v. Vermont Central R. R.*, 26 Vt. 751; *Veazie v. Penobscot R. R.*, 49 Maine, 123.

² *New York v. Dimick*, 20 Abb. N. C. 15, 49 Hun, 241; *Brockville v. Arthurs*, 130 Penn. St. 501; and see *McDonald v. Lockport*, 28 Ill. App. 157.

³ *Rochester v. Campbell*, 55 Hun, 138. Where an electric light company was under a contract to light a village and its assignor had erected a pole in a street for that purpose, with the consent of the municipality, it was held that the electric light company was not liable to the municipality for any part of a judgment recovered against the latter for an injury occasioned to a private person by his coming into collision with the pole. *Geneva v. Brush Electric Light Co.*, 50 Hun, 581.

⁴ *Lowell v. Boston & Lowell R. R.*, 23 Pick. 24; *Lowell v. Short*, 4 Cush. 275; *Newbury v. Connecticut & Passumpsic R. R.*, 25 Vt. 377.

⁵ *New York v. Dimick*, 20 Abb. N. C. 15, 49 Hun, 241, but see *Lowell v. Boston & Lowell R. R.*, 23 Pick. 24.

doers, defendant, is entitled to recover the whole, or at least a proportional part, according to circumstances, of the damages in which he has been mulcted, from the others.¹ Thus it is said: "when two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or *partici-*

¹ See the opinion of Ellsworth, J., in *Bailey v. Bussing*, 28 Conn. 455, in which case it was held, where judgment had been recovered in tort against three defendants jointly interested in the running of a stage-coach, for an injury caused to a traveller upon the road by the actual negligence of one of the defendants, who was driving, and another defendant had paid the judgment; that the defendant who had so paid was entitled to a contribution at least from the defendant actually negligent, if not to a full indemnity. See *Pownal v. Ferrand*, 6 B. & C. 439; *Jenkins v. Tucker*, 1 H. Bl. 90, and also *Nashua Iron & Steel Co. v. Worcester & Nashua R. R.*, 62 N. H. 159. In the latter case it was held that a plaintiff who, by reason of his and the defendant's negligence, has been compelled to pay damages to another, may recover indemnity, although, but for his own negligence, the injury would not have happened, if, at the time it occurred, he could not, and the defendant could, have prevented it by the exercise of ordinary care. In this case, by the defendant's careless management of its cars and engines, the plaintiff's horse was injured, and ran, and injured one C. who was without fault; and C. recovered damages against the plaintiff for the injury. It was held that C. had the right to pursue her remedy, in the first instance, against either the plaintiff or the defendant. The case seems to assume that the negligent act of the defendant was the proximate cause of the fright of the plaintiff's horse, and also of the subsequent injury to C. And see § 99, *ante*, and cases cited. But if this be so, it is difficult to see how, in law, C. could be entitled to recover against the plaintiff, in the former case, since the law recognizes but one proximate and efficient cause for the same act. See §§ 97, 98, *ante*. It was held that a natural gas company compelled to pay damages for personal injuries caused by the leakage of gas from a defective pipe may recover over from a street railway company whose negligent excavation in the street caused the pipe to break. *Philadelphia Co. v. Central Traction Co.*, 165 Penn. St. 456. As to the doctrine of contribution, as between wrong-doers generally, see also *Pearson v. Skelton*, 1 M. & W. 504; *Betts v. Gibbins*, 2 Ad. & El. 57; *Fletcher v. Harcott*, Hutt. 55, 1 Rol. Abr. 95; *Jacques v. Golightly*, 2 Wm. Bl. 1073; *Smith v. Bromley*, 2 Dougl. 696; *Williams v. Hedley*, 8 East, 378; *Gray v. Boston Gas Light Co.*, 114 Mass. 149; *Jacobs v. Pollard*, 10 Cush. 287; *Worcester v. Eaton*, 11 Mass. 377; *Coventry v. Barton*, 17 Johns. 142.

pes criminis, and the damage results from their joint offence. The rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case, the parties are not *in pari delicto* as to each other, though, as to third persons, either may be liable. The numerous cases are analogous, where towns, having been held liable for an unsafe condition of the highway, have recovered from persons whose acts caused the unsafe condition.”¹ The cases in this respect recognize no distinction between a liability cast upon the municipality by statute, as in the case of highway liabilities, and a liability created by the common law.² It is to be observed, however, that, in many States, the remedy over in favor of the municipality, as against the third party in actual fault, is provided for by the statute.

¹ *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 154.

² See *Lowell v. Boston & Lowell R. R.*, 23 Pick. 24; *Lowell v. Short*, 4 Cush. 275; *Swansey v. Chace*, 16 Gray, 303; *Milford v. Holbrook*, 9 Allen, 17; *West Boylston v. Mason*, 102 Mass. 341.

CHAPTER VII.

OF THE MASTER'S OBLIGATION TO HIS EMPLOYEES.

SECTION I.

TO PROVIDE SUITABLE PLACES, APPLIANCES, AND AGENTS.

§ 192. **As to Places and Appliances, Generally.** — The authorities are agreed that it is the duty of the master to provide a suitable place in which, and suitable appliances with which, the employee, being himself in the exercise of due care, can perform his duty without being exposed to unnecessary dangers; that is, to dangers which do not of necessity attend the exercise of the employment.¹ This obligation of the master is sometimes referred to the implied contract of service;² but it is believed to rest, primarily, upon the general duty which

¹ *Indemaur v. Dames*, L. R. 2 C. P. 311; *Patterson v. Wallace*, 1 Macq. 748; *Cowley v. Mayor of Sunderland*, 6 H. & N. 565; *Williams v. Clough*, 3 H. & N. 258; *Mellors v. Shaw*, 30 L. J. Q. B. 333, 1 Best & S. 437; *Watling v. Oaster*, L. R. 6 Ex. 73; *Ryan v. Fowler*, 24 N. Y. 410; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 275; *Cayzer v. Taylor*, 10 Gray, 274; *Seaver v. Boston & Maine R. R.*, 14 Gray, 466; *Snow v. Housatonic R. R.*, 8 Allen, 441; *Gilman v. Eastern R. R.*, 10 Allen, 233, 13 Allen, 433; *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Neveu v. Sears*, 155 Mass. 303; *O'Driscoll v. Faxon*, 156 Mass. 527; *Smith v. Peninsular Car Works*, 60 Mich. 501; *Johnson v. Spear*, 76 Mich. 139; *Van Dusen v. Letellier*, 78 Mich. 492; *Brown v. Gilchrist*, 80 Mich. 56; *Cincinnati, H. & D. R. R. v. McMullen*, 117 Ind. 439; *Kaspari v. Marsh*, 74 Wis. 502; *Cons. Coal Co. v. Scheiber*, 167 Ill. 539; *Price v. Richmond & D. R. R.*, 38 S. C. 199. The general duty of the master is the same in respect of animals as of machinery or other appliances. *Hammond Company v. Johnson*, 38 Neb. 244.

² *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Summersell v. Fish*, 117 Mass. 312; *Albro v. Jaquith*, 4 Gray, 99; *Alaska Co. v. Whelan*, 27 U. S. App. 1.

requires the owner of property not negligently to expose to danger persons who come upon his premises to transact business with him, or by his invitation or procurement.¹ So far as this general rule of duty is modified or controlled by the existence of the relation of employer and employee, such modification is the result of the implied contract by which the servant agrees not to look to the employer for indemnity for the negligence of his fellow-servants,² and to assume the risk obviously attending the exercise of the employment.³ The issue being the defendant's negligence, the burden is on the plaintiff to show that the appliances furnished him for doing his work were insufficient or dangerous.⁴ But, while if the appliances furnished were, in the beginning, safe and suitable, it must, in order to charge the master, be shown that he was in fault in not ascertaining that these had become unsafe;⁵ yet, if the master fail to furnish safe appliances in the first place, he is to be charged with knowledge of any defect in them by reason of which an employee is injured.⁶

§ 193. **This a Personal Duty.** — The duty of the master in this respect is not to be avoided by delegating it to another, whether to a fellow-servant of the injured employee⁷ or to a

¹ See §§ 66 *et seq.*, *ante*, and *Riley v. Baxendale*, 30 L. J. Ex. 87.

² See §§ 212 *et seq.*, *post*, notes and cases cited.

³ See §§ 204 *et seq.*, *post*, notes and cases cited.

⁴ See § 111, *ante*, § 199, *post*, and cases cited, and also *Minty v. Union Pacific R. R.*, 21 Pac. Rep. 660 (Idaho, 1889); *Brunswick v. Strilka*, 30 Ill. App. 186; *Hudson v. Charleston, C. & C. R. R.*, 104 N. C. 491. But see *Louisville & Nashville R. R. v. Coulton*, 86 Ala. 129. Where a declaration specifies the negligence complained of and the court finds that the defects alleged could not have caused the injury, the defendant is not bound to show that no other defect could have caused the injury. *Lennon v. Rawitzer*, 57 Conn. 583.

⁵ *Fenderson v. Atlantic City R. R.*, 56 N. J. L. 788.

⁶ *Union Pacific R. R. v. James*, 56 Fed. Rep. 1001, 6 C. C. A. 217.

⁷ *Sanborn v. Madera Flume & Trading Co.*, 70 Cal. 261; *Moynihan v. Hills Co.*, 146 Mass. 586; *Hough v. Texas & Pacific R. R.*, 100 U. S. 213; *Texas & Pacific R. R. v. Barrett*, 30 U. S. App. 196; *Gowen v. Bush*, 40 U. S. App. 349; *Maher v. Thropp*, 59 N. J. L. 186; *Blazenic v. Iowa Coal Co.*, 102 Iowa, 706; *Houston v. Brush*, 66 Vt. 734; *St. Louis S. W. R. R. v. Threat*, 12 Tex. Civ. App. 375; *Flike v. Boston & Albany R. R.*, 53 N. Y. 549; *Trihay v. Brooklyn Lead Co.*, 4 Utah, 468; *Bowers v.*

contractor, if the means of doing the work are furnished by the owner and are defective.¹ For the master, when acting through an agent, undertakes that his agent shall be a suitable person for the position he holds, and is responsible for his negligence.² It is said that if a contrary rule were adopted it would result in many cases to relieve corporations, or any employer who acts through general superintendents, from liability to servants occasioned by imperfect and defective machinery or appliances, or by incompetent or reckless workmen.³ But if the machine or other appliance was originally safe and proper, and the injured employee was himself

Union Pacific R. R., 4 Utah, 215; *Morton v. Detroit*, B. C. & A. R. R., 81 Mich. 423. It is held that having directed the proper person to repair a defective machine, the master is not responsible for an accident caused by the use of it. *Schulze v. Rohe*, 149 N. Y. 132.

¹ *Johnson v. Spear*, 76 Mich. 139; *Chicago, B. & Q. R. R. v. Clark*, 26 Neb. 645; *McIntyre v. Boston & Maine R. R.*, 163 Mass. 189.

² *Northern Pacific R. R. v. Herbert*, 116 U. S. 650; *Stewart v. Philadelphia, W. & B. R. R.*, 17 Atl. Rep. 639 (Del. 1889); *Richmond & Danville R. R. v. Norment*, 84 Va. 167; *Niantic Coal & Mining Co. v. Leonard*, 126 Ill. 216; *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100. There are cases which seem to hold that if one servant suffers injury by the wilful act or wanton negligence of another, the master is responsible. Thus where the servant's employment included the safe custody and proper use of dangerous articles, as signal torpedoes, it was held that if by the dangerous use of these, even against the rules of the master, another servant was injured, the master would be liable. *Pittsburg, C. & St. L. R. R. v. Shields*, 47 Ohio St. 387. In *Shumacher v. St. Louis & S. F. R. R.*, 39 Fed. Rep. 174, it was held that if a railway conductor utterly fails to take any precaution to prevent injury to his principal's employee, whom he knows to be in a dangerous position, the fact that the employee carelessly placed himself in that position may not be a defence to his action against the railroad company for his injury; since the recklessness of the conductor, under such circumstances, may amount to a wilful act. If the overseer of a room in a mill imposes upon a workman labor which he cannot perform without assistance, and knowingly acquiesces in his obtaining help from such other workmen as he chooses to call, and the workman, in good faith, although not in the exercise of good judgment, orders a boy to assist him who is unfit by reason of lack of experience and instruction, and who is thereby injured, the owner of the mill stands, as to liability for the injury, in the relation of master to the person injured. *Patnode v. Warren Cotton Mills*, 157 Mass. 283.

³ *Laning v. New York Central R. R.*, 49 N. Y. 521, 532.

charged with the duty of seeing that it was kept in a proper and safe condition for use, and by reason of his own failure of duty in this respect he is injured, the employer is not responsible.¹ The procuring of machinery from a reputable maker meets the standard of ordinary care; and, generally, it is not negligence on the part of an employer to place in his mill, and, after proper inspection, to use, such machinery.² It is to be observed that the American courts generally are disposed to hold the master to a stricter obligation than was enforced by the English courts before the passage of the Employers' Liability Act.³ Thus it was said by Lord Chancellor Cairns: "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do."⁴ Commenting upon the rule thus stated, the court in Massachusetts say: "Such a rule makes the liability of the master depend largely upon the extent of the supervision which he has undertaken personally to exercise over his business, and recognizes few duties except those which the master has undertaken personally to perform. . . . If a master who takes no personal part in the management of his business has any duty to perform towards his servants, it is difficult to say that it is always wholly performed by doing two things; namely, by employing competent servants, and by furnishing ample

¹ *Lee v. Barrow Steamship Co.*, 14 Daly, 230; *Dewey v. Park*, 76 Mich. 631.

² *Reynolds v. Merchants' Woolen Co.*, 168 Mass. 501.

³ 43 & 44 Vict. c. 42.

⁴ *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, 332. The English courts hold, however, that the master is responsible for his own negligence if he personally engages or interferes in the work. Thus where the master interfered with the construction of a scaffold and ordered improper and unsafe materials to be used in it, by reason of which the employee was injured, the employer was held to be liable. *Roberts v. Smith*, 26 L. J. Ex. 319; and see *Warren v. Wildee*, 41 L. J. C. P. 104, n.; *Ashworth v. Stanwix*, 30 L. J. Q. B. 183; *Mellors v. Shaw*, 30 L. J. Q. B. 333, 1 B. & S. 437; *Griffiths v. Gidlow*, 3 H. & N. 648.

means. In order that the business may be properly managed, the servants should not only be competent, but they should be numerous enough to do, and they should have the means of doing, whatever ought reasonably to be done, and such regulations should be established as will insure the requisite subordination and control, and the exercise of reasonable intelligence and care in the conduct of the business; and it is almost as difficult to define all the duties of the master in these respects as to define the duties of a person under other relations. If it is not the absolute duty of the master to furnish suitable machinery, and if he is not held to warrant that the servants that he employs to furnish the machinery, or to keep it in repair, shall always use reasonable care, then the duty of a master who does not personally conduct his business, if he is under any duty, we think, must be to use reasonable care in the management; and that is to exercise, or have exercised, a reasonable supervision over the conduct of his servants, as well as to use reasonable care in seeing that his servants are competent, and are furnished with suitable means for carrying on the business.”¹ So, in the same case, it was held that if a master employs a servant to work on a machine which is so far out of repair as to be dangerous, and which has remained in that condition for a long time, he is not relieved from responsibility to the servant for an injury suffered while working on the machine, merely by proof that he had intrusted to competent servants the duty of making ordinary repairs of the machine, and the keeping of it in order from day to day, and has supplied them with suitable means for that purpose, if it appears that the servants only inspected the machine for the purpose of keeping it in order so that it would do good work, without regard to its condition as a dangerous machine. Thus the result of the view held by the Massachusetts court is to establish the rule that the failure of the master to provide proper means and appliances for the doing of the work is not to be avoided by the circumstance that such failure was directly chargeable to the negligence of a fellow-servant of the injured employee; so that the common-

¹ Per Field, C. J., in *Rogers v. Ludlow Manuf. Co.*, 144 Mass. 198, 202.

law rule that the master is not liable for injuries caused by the negligence of the plaintiff's fellow-servant has no application to such cases.¹ It is believed that the rule of absolute liability thus expressed has not been so distinctly formulated elsewhere; but the principle of it has been recognized in numerous American cases, which proceed upon the general ground that the servant charged with the furnishing or equipment of machinery or appliances is not the fellow-servant of the injured employee, but the agent of the common master. Thus it is said in Michigan: "It is well settled . . . that the master must provide his servant with a safe place to work in, and furnish him with suitable machinery and appliances with which to perform such work, and it is his duty to keep such machinery and appliances in good repair. If he cannot do this himself, personally, he must provide some other person to take his place in this respect; and the person to whom the master's duty is thus delegated—no matter what his rank or grade, no matter by what name he may be designated—cannot be a servant in the sense or under the rule applicable to injuries occasioned by fellow-servants. Such a person is an agent, and the rules of law applicable to principal and agent must apply."² So where the employee of a railroad company was injured by a defect in a car of the defendant on which he was employed, it was said: "There can be no question as to the liability of the railroad company to the plaintiff for the injuries he sustained. If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move and to stop them were kept in repair and in good working order, its liability

¹ It is said: "It was settled law in Massachusetts [before the passage of the Employers' Liability Act, c. 270, Acts of 1887] that masters were personally bound to see that reasonable care was used to provide reasonably safe and proper machinery, so that, if the duty was entrusted to another and was not performed, the fact that the proximate cause of the damage was the negligence of a fellow-servant was no defence." Per Holmes, J., in *Ryalls v. Mechanics' Mills*, 150 Mass. 188, 194, citing *Gilman v. Eastern R. R.*, 13 Allen, 433, 440; *Lawless v. Connecticut River R. R.*, 136 Mass. 1.

² Per Morse, J., in *Van Dusen v. Letellier*, 78 Mich. 492, approved in *Morton v. Detroit, B. C. & A. R. R.*, 81 Mich. 423, 431.

. . . would not be the subject of contention. . . . If, however, one was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty was concerned, the representative of the company; his negligence was its negligence, and imposed a liability upon it.”¹ So where the employee was injured by reason of the imperfect protection of the machinery upon which she was employed, and it was contended that the defect was caused by the negligence of a fellow-servant, the court said that “the person whose duty it was to keep the machinery in order, so far as that duty goes, was not, in any legal sense, the fellow-servant of the plaintiff. To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters,—they are not employments in the same common business, tending to the same common result. . . . The two persons may, indeed, work under the same master and receive their pay from the same source; but this is not sufficient. . . . In the repair of the machinery the servant represented the master in the performance of his part of the contract, and therefore . . . his negligence in that respect is the omission of the master or employer in contemplation of law.”² Many American cases, however, have held,

¹ Per Field, J., in *Northern Pacific R. R. v. Herbert*, 116 U. S. 650, 652; and see *Cincinnati, H. & D. R. R. v. McMullen*, 117 Ind. 439, 444.

² *Shanny v. Androscoggin Mills*, 66 Maine, 420, See also *Wedgwood v. Chicago & Northwestern R. R.*, 41 Wis. 478; *Bessex v. Chicago & Northwestern R. R.*, 45 Wis. 477; *Brabbitts v. Chicago & Northwestern R. R.*, 38 Wis. 289; *Smith v. Chicago, Milwaukee & St. P. R. R.*, 42 Wis. 520; *Toledo, Peoria & Warsaw R. R. v. Conroy*, 68 Ill. 560; *Drymala v. Thompson*, 26 Minn. 40; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, as cited § 42, *ante*; *Laning v. New York Central R. R.*, 49 N. Y. 521. In the latter case, the court holds that the implied contract of the master with the servant requires “that the servant shall be under no risks from imperfect or inadequate machinery, or from unskilled or inadequate servants of any grade. It is a duty or contract to be affirmatively and positively fulfilled and performed. And there is not a performance of it until there has been placed for the servant’s use perfect and adequate physical means and for his help-meets fit and competent fellow-servants; or due care used to that end. That some general agent clothed with power and charged with the duty to make performance for the master, has not done

either directly or by implication, the English rule¹ upon this subject.²

§ 194. **Employer not Answerable for Latent Defects: Illustrations of Rule.**—The master, not being an insurer of the safety of his employees, is not responsible for injuries to them caused by concealed defects which could not have been detected by a careful inspection in season to avoid the accident.³ So, in a large class of cases, the question is whether or not the defect in tools or machinery which caused the accident was such as ought to have been perceived upon a reasonably careful inspection;⁴ and the mere fact that some sort of an inspection has been made, by the person whose duty it was to make it, will not be sufficient to debar the plaintiff from a recovery.⁵ Since the master is charged with knowledge of

his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's non-performance. When it is done, then and not till then, his duty is met or his contract kept."

¹ See *Wilson v. Merry*, *supra*.

² See cases cited, §§ 197, 198, *post*.

³ *Readhead v. Midland Railway*, 2 Q. B. 412, 4 Q. B. 379; *Ladd v. New Bedford R. R.*, 119 Mass. 412; *Roughan v. Boston & L. Block Co.*, 161 Mass. 24; *Reynolds v. Merchants' Woolen Mill*, 168 Mass. 501; *Lincoln Street R. R. v. Cox*, 48 Neb. 807; *Reid v. Central R. R. & Banking Co.*, 81 Ga. 694; *Georgia R. R. & Banking Co. v. Nelms*, 9 S. E. Rep. 1049 (Ga. 1889); *Hotis v. New York Central & H. R. R. R.*, 6 N. Y. Sup. N. E. Rep. 605; *O'Donnell v. Baum*, 38 Mo. App. 245. So, as to a concealed flaw in a rail. *Deolin v. Wabash, St. L. & P. R. R.*, 87 Mo. 545.

⁴ *Smith v. New York Central & H. R. R. R.*, 118 N. Y. 645; *Witte v. Diefenbach*, 54 N. Y. S. C. 508; *Thorn v. New York City Ice Co.*, 46 Hun, 497; *Sneider v. Treichler*, 56 Hun, 309; *Le Croy v. New York, L. E. & West. R. R.*, 10 N. Y. Sup. N. E. Rep. 382; *Morton v. Detroit, B. C. & A. R. R.*, 81 Mich. 423; *Chicago & Alton R. R. v. Dunn*, 23 Ill. App. 148; *Moran v. Brown*, 27 Mo. App. 487; *Covey v. Hannibal & St. Jo. R. R.*, 27 Mo. App. 170; *Code, Ala.*, § 2590, and *Memphis & Charleston R. R. v. Askew*, 90 Ala. 5; *Howard Oil Co. v. Davis*, 76 Tex. 630; *Missouri Pacific R. R. v. Henry*, 75 Tex. 220; *Daniels v. Union Pacific R. R.*, 23 Pac. Rep. 762 (Utah, 1890).

⁵ Thus the fact that the defendant railroad has inspected the appliances by reason of defect in which the accident occurred, just before the accident, and found them in good order, will not be a defence to the action if it appears that the officer of the defendant making the inspection passed over defective machinery without noticing it. *Missouri Pacific R. R. v. McElyea*, 71 Tex. 873.

the tendency of appliances to wear out and deteriorate,¹ it is held that in order to detect defects not perhaps at first discoverable, but which may manifest themselves after the machinery has been for some time in use, it is the duty of the employer to adopt and use from time to time such practicable tests as may reasonably be expected to lead to the discovery of any defects. If there are known methods of testing the condition of machinery from time to time, it is said to be the duty of the employer to adopt them although these may not be infallible.² A correlative question is whether the plaintiff himself used reasonable care to detect the defect; but he will not be held to make the closest possible inspection.³ The burden of proof is upon the plaintiff to show that the defendant has been negligent in not detecting the defect; and the fact of such negligence must be shown by positive testimony, unless in cases in which the happening of the accident is *prima facie* evidence of negligence.⁴ Where the facts are conclusive of the question, it may be determined by the court as being a question of law; but where the facts in testimony are controverted, or no clear conclusion can be drawn from

¹ Louisville R. R. v. Utz, 133 Ind. 265.

² Manser v. Eastern Counties Railway, 3 L. T. 585; Murphy v. Phillips, 35 L. T. 477.

³ Morton v. Detroit, B. C. & A. R. R., 81 Mich. 423, and see §§ 150, 151, *ante*, notes and cases cited.

⁴ Duffy v. Upton, 113 Mass. 544. So it was held in this case, that the mere fact that the machine upon which the employee was at work broke, and hurt the employee, upon extra force being applied to it, would not justify the inference that the master was negligent in that he had furnished an improper machine. The rule, as stated in the text, is founded upon the assumption that the burden remains throughout upon the plaintiff to show that the defendant has been negligent. See §§ 111, 111 *a*, 112, *ante*. It has been held that a servant, in order to recover for an injury happening to him in the course of his service, through defects in the machinery, or appliances furnished for doing the work, must allege and prove actual notice, to the master, of the existence of the defect. McMillan v. Saratoga & Washington R. R., 20 Barb. 449, referring to *dicta* contained in Keegan v. Western R. R., 4 Selden, 175; but it is apprehended that this case does not state the existing rule of law upon this subject, although if the existence of the defect be known to the servant, and he, concealing it from the master, continue in the employment, he may take the risk of injury. See §§ 203 *et seq.*, *post*, notes and cases cited.

them, the question will be left to the jury, as being a question of fact.¹ Applying the rule stated, it is held generally that a master is responsible to his servant for injuries suffered by the latter by reason of defects in a building in which the servant was at work, which defects the master knew or ought to have known, but which were not obvious, nor easily to be detected by the servant.² Where the injury was occasioned by the falling of an elevator, it not appearing what was the direct cause of the fall, and it did appear that the elevator was of a style generally used; that it was selected, after careful consideration, because of its high reputation for safety; that it was made of the best materials, in the best style, and for a first-class price by manufacturers of high reputation, by whom it was set up in the defendant's building; and that it had been in constant use both before and after the accident without other accident, it was held that the employee's action for his injury could not be maintained.³ But where there is evidence tending to show that the elevator was decayed, or without proper safety appliances, or out of running order, or that the defendant was in any respect negligent in its management, the question of negligence is for the jury.⁴ Where an accident was caused by the explosion of a boiler which had been made by a manufacturer of good reputation, and which the defendant had had duly inspected from time to time, no defects being discovered at such inspections; and after the explosion it was found that the boiler was made of inferior iron, and that the rivets were defective, but that these defects could have been discovered only by cutting into the iron and removing the rivets; it was held error to charge that if the defects were "discoverable by examination, or the application of known tests, then the defendants are chargeable whether

¹ *Seese v. Northern Pacific R. R.*, 39 Fed. Rep. 487; *Pullutro v. Delaware, L. & W. R. R.*, 7 N. Y. Sup. N. E. Rep. 510 (1890); *Philadelphia & Reading R. R. v. Huber*, 24 W. N. C. 554.

² *Ryan v. Fowler*, 24 N. Y. 410. See § 197, *post*, and cases cited.

³ *Kaye v. Rob Roy Hosiery Co.*, 58 N. Y. S. C. 519, and see *Strawbridge v. Bradford*, 24 W. N. C. 536; *Hart v. Naumburg*, 57 N. Y. S. C. 392.

⁴ *Kern v. DeCastro & Donner Sugar Ref. Co.*, 5 N. Y. Sup. N. E. Rep., 548 (1889); *Appeal of Standard Manuf. Co.*, 18 Atl. Rep. 637 (Penn. 1889).

they knew it or not," there being no testimony as to what known tests it would be proper to resort to.¹ Where there was testimony to show that the appliances furnished by an employer for the purpose of lowering his employees into an iron mine were unsafe, and not the best employed by the defendant elsewhere, it was held that the question of his negligence was for the jury, although he had employed a machinist to put the machinery in good order three weeks before the accident, and it appeared that the machinery had been much used, and that no accident had ever before occurred from its use.² Under a statute providing that owners of mines shall "provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe . . . persons descending into and ascending out of said shaft," it was held that one employed at the bottom of a shaft, injured by a lump of coal falling from a car by reason of its not being covered as provided by the statute, might recover, under the statute, for his injuries.³

§ 195. **Same Subject: Rule applied to Railroads.** — A railroad is bound, as to its employees, to provide safe and suitable appliances for the carrying on of its business,⁴ but it is not bound, as matter of law, to use absolutely the best and safest appliances.⁵ And the question whether certain appliances were necessary must often be determined by the circumstances of the particular case. Thus it is held, generally, that the operation of a railroad without blocking its frogs and switches is not, as matter of law, negligence;⁶ but it was

¹ *Ballard v. Hitchcock Manuf. Co.*, 58 N. Y. S. C. 188.

² *Myers v. Hudson Iron Co.*, 150 Mass. 125.

³ *Durrant v. Lexington Coal Mining Co.*, 97 Mo. 62.

⁴ *Coleman v. Wilmington, C. & A. R. R.*, 25 S. C. 446; *Richmond & Danville R. R. v. Norment*, 84 Va. 167.

⁵ *Chicago, B. & Q. R. R. v. Warner*, 123 Ill. 138; *Chicago & Alton R. R. v. Kerr*, 148 Ill. 605; *O'Connor v. Ill. Cent. R. R.*, 83 Iowa, 105; *Gumbel v. Ill. Cent. R. R.*, 48 La. Ann. 1180; *St. Louis & S. F. R. R. v. Weaver*, 35 Kan. 412.

⁶ *Missouri Pacific R. R. v. Lewis*, 24 Neb. 848, and see *Hewitt v. Flint & Pere Marquette R. R.*, 67 Mich. 61. A statute requiring railroads to fill and block switches so as to prevent the feet of their employees or others from being caught therein is not satisfied by the

held negligence to use at a station, where there were several tracks and where couplings had to be promptly made, open instead of blocked frogs, by the use of which the feet of the employees engaged in making couplings were likely to be caught.¹ It is, as matter of law, negligence to leave a hole unnecessarily in a road-bed, so that a brakeman, in the performance of his duty in coupling cars, steps into it;² and so to permit rotten ties to remain in the track, whereby an employee in the performance of his duty is injured.³ Although

adoption of a method which, by the ordinary use of the road, becomes ineffectual within two or three days. *Eastman v. Lake Shore & M. S. R. R.*, 101 Mich. 597.

¹ *Seley v. Southern Pacific R. R.*, 23 Pac. Rep. 751 (Utah, 1890).

² *Filbert v. Delaware & Hudson Canal Co.*, 56 N. Y. S. C. 170. Where a brakeman in the line of his duty was running along by the side of a train attempting to uncouple cars and fell under the train in consequence of tripping over loose boards which covered a platform between the tracks, it was held that the railway company was liable for the injury which he thereby suffered. *Sweat v. Boston & Albany R. R.*, 156 Mass. 284.

³ *Gulf, Colorado & S. F. R. R. v. Pettis*, 69 Tex. 689; *Houston & T. C. R. R. v. McNamara*, 59 Tex. 255; *Soder v. St. Louis, Iron Mt. & Southern R. R.*, 100 Mo. 673; *McFee v. Vicksburg, S. & P. R. R.*, 42 La. Ann. 790. It seems, however, to have been held in Arkansas, that the danger of injury from rotten ties falls within the risks assumed by the employee. *Little Rock & Fort Smith R. R. v. Townsend*, 41 Ark. 382, but see *Little Rock, M. R. & T. R. R. v. Levette*, 48 Ark. 333. For other cases in which the road has been held to be liable, as to its employees, for maintaining a badly constructed roadway, see *Snow v. Housatonic R. R.*, 8 Allen, 441; *Trask v. California Southern R. R.*, 63 Cal. 96. In *Patterson v. Pittsburg, &c. R. R.*, 76 Penn. St. 289, the defendant was held to be liable for maintaining a side-track with too short a curve and an improper connection with the main track; and so in *Porter v. Hannibal & St. Joseph R. R.*, 60 Mo. 160, for maintaining such a track improperly constructed, and in an uneven condition; but see *Tuttle v. Detroit, Grand Haven & Milwaukee Railway Co.*, 122 U. S. 189, where it is said that the courts are not required to restrict the right of a railroad to construct its tracks in its freight depots and yards with such curves as it may deem necessary and proper. It was held that the fact that a "lip" had formed at the end of a rail at a switch did not show negligence on the part of the company, it appearing that a sufficient force of track-repairers was kept at work in the yard where the accident happened, every day, and that the switch had been used constantly up to the time of the accident and that nothing wrong in it had been detected by any of the train-men using it. *Chicago & Alton R. R. v. Stites*, 26 Ill. App. 430. It is the duty of a railway to

persons employed upon railroads having steep grades and sharp curves assume greater risks than do those who are employed upon railroads located on level land, yet the degree of care to be required in the construction of a track varies with circumstances, and what might not be faulty construction upon the level might be so in a road of steep grades and sharp curves.¹ It is the duty of a railway company to furnish reasonably safe tracks for switching purposes.² Where a statute imposed the absolute duty on a railroad company to maintain fences along its line, it was held that the statute was for the protection not only of abutters on the railroad but of trains and employees as well, so as to secure these a safe place in which to work, and that if, by reason of the company's failure to maintain such a fence, a train employee was injured, the company might be liable.³ A railroad may be liable for injuries caused to its employees by the defective construction of trestle-work upon its line,⁴ or by its failure to repair a "tell-tale" or bridge-guard,⁵ or by a culvert improperly built,⁶ or by the accidental starting of a locomotive

inspect its tracks after heavy rains. See *Kansas City, &c. R. R. v. Kirksey*, 60 Fed. Rep. 999, 9 C. C. A. 321.

¹ *Patton v. Southern R. R.*, 42 U. S. App. 567.

² *Illinois Central R. R. v. Sanders*, 166 Ill. 270.

³ *Atchison, Top. & Santa Fe R. R. v. Reesman*, 19 U. S. App. 596; *Chic., B. & Q. R. R. v. Anderson*, 38 Neb. 112. It is held to be a question of fact whether it is negligence in a railroad to leave brush and timber on its track so as to obscure the view to employees engaged in switching. *Oregon Short Line, &c. R. R. v. Tracy*, 29 U. S. App. 529.

⁴ *Elmer v. Locke*, 135 Mass. 575; *Interstate C. R. T. R. R. v. Fox*, 41 Kan. 715.

⁵ *Warden v. Old Colony R. R.*, 137 Mass. 204; *Darling v. N. Y., Prov. & Boston R. R.*, 17 R. I. 708; *Wallace v. Cent. Vt. R. R.*, 138 N. Y. 302; *Chicago, M. & P. R. R. v. Carpenter*, 56 Fed. Rep. 451, 5 C. C. A. 551. As to the duty of the railroad in constructing overhead bridges, see § 205, *post*.

⁶ *Davis v. Central Vermont R. R.*, 55 Vt. 85; *Chicago, &c. R. R. v. Swett*, 45 Ill. 197. It is held that a provision that railway companies shall fence their tracks and be liable for injuries to live-stock occasioned by their failure so to do, is for the protection of persons on the trains as well as of animals on the tracks, and so that a railway company is liable to a brakeman injured by the collision of his train with an animal which had come upon the track through a defect in the fence. *Donegan v. Erhardt*, 119 N. Y. 468.

tive by reason of its having a leaky throttle valve.¹ It has been held negligent on the part of the railroad to fail to provide foot-boards for its freight cars,² or safe and suitable car-ladders,³ or sound coupling-pins and draw heads.⁴ So the railroad was held liable where the buffers on two of its cars were so placed that they passed each other when the cars were shunted together, and crushed the brakeman who was engaged in coupling them.⁵ If the railway company undertakes to run its trains by telegraph, it is bound to furnish suitable lines and operators; and if it fails to do this, an employee who is injured by reason of its neglect may maintain an action for such injury.⁶ The facts that a defective freight car was attached to a train, with nothing to show that it differed from the other cars, and that it became necessary to use it in such a manner as resulted in the injury of an em-

¹ *Conners v. Durite Mfg. Co.*, 157 Mass. 163.

² *Hosie v. Chicago, Rock Island & Pacific R. R.*, 75 Iowa, 683.

³ *Richmond & Danville R. R. v. Moore*, 78 Va. 93, and see *Keith v. New Haven & Northampton Co.*, 140 Mass. 175.

⁴ *Bowers v. Union Pacific R. R.*, 4 Utah, 215; *Chicago, R. I. & Pac. R. R. v. Linney*, 19 U. S. App. 315. It was held that the failure to provide a flat car with brakes was not actionable negligence. *Hewitt v. Flint & Pere Marquette R. R.*, 67 Mich. 61. See *Chicago, B. & Q. R. R. v. Warner*, 123 Ill. 138. Where a brakeman, in the discharge of his duty attempted to climb upon a coal car and, in so doing, tried to put his foot upon the "jaw-strap," an appliance usually placed out of sight under the bodies of such cars to strengthen them, and, there being no "jaw-strap" under the car, his foot slipped to the rail and was crushed, it was held that the question of the defendant's negligence in omitting to furnish the car with a "jaw-strap" was for the jury. *Coates v. Boston & Maine R. R.*, 153 Mass. 297; and see *Louisville, N. A. & C. R. R. v. Buck*, 116 Ind. 566.

⁵ *Ellis v. New York Central R. R.*, 95 N. Y. 546; *Baltimore & Potomac R. R. v. Mackey*, 157 U. S. 72; *Texas & Pac. R. R. v. Archibald*, 170 U. S. 665; *Atchison, Topeka & S. F. R. R. v. Meyers*, 24 U. S. App. 295; *Terre Haute & Ind. R. R. v. Mansberger*, 24 U. S. App. 551; *Gottlieb v. N. Y., L. E. & W. R. R.*, 100 N. Y. 462; *Dooner v. Del. & H. Canal Co.*, 164 Penn. St. 17; *Eddy v. Prentice*, 8 Tex. App. 58. A railroad is not negligent merely in conveying over its lines cars differing in construction from those owned by itself. *Louisville, N. A. & C. R. R. v. Bates*, 146 Ind. 564. See *post*.

⁶ *Walker v. Grand Trunk Railway*, 2 Hask. 97; *Grand Trunk Railway v. Walker*, 154 U. S. 653.

ployee who had no knowledge of its condition, were held to furnish *prima facie* evidence of negligence on the part of the company, without proof that it had notice of the defect.¹ The same rule was held as to defects in the coupling machinery of foreign cars used on the defendant road, when these were apparent upon ordinary inspection.² But it has been held that where an accident to an employee occurs by reason of the improper loading of a car, it must appear, in order to a recovery, that the conductor of the train, or other person in charge, had actual knowledge of the unsafe condition of the car.³ Where a railroad company placed upon its track a car higher than the cars which it had customarily used, so that an employee, standing on the car in the performance of his duty, was struck by a bridge over the track and killed, which would have been impossible had he been standing on a car of the height customarily used by the road, it was held that the question of the defendant's negligence was for the jury.⁴ A

¹ Guthrie v. Maine Central R. R., 81 Maine, 572.

² Goodrich v. New York Central & H. R. R. R., 116 N. Y. 397. The act, April 2, 1890, Ohio Laws, vol. 87, p. 149, makes it unlawful for a railroad knowingly to use or operate any defective car or locomotive, and provides that in an action for injuries proof of a defect in a car or locomotive shall be *prima facie* evidence of negligence; see Railway Co. v. Erick, 51 Ohio St. 146; but under the act a plaintiff employee is not excused from the exercise of due care; and he will not be justified in continuing in the service after knowledge of the defect, unless he has a right to rely upon a promise of the railroad to make the defect safe. Hesse v. Railroad Co., 58 Ohio St. 167.

³ Louisville & Nashville R. R. v. Brice, 84 Ky. 298.

⁴ Stirk v. Central R. R. & Banking Co., 79 Ga. 495. In Hodgkins v. Eastern R. R., 119 Mass. 419, it was held that the making up of a train of cars with platforms of unequal height, whereby a brakeman engaged in the line of his duty was injured, being the act of the fellow-servant of the plaintiff, he could not recover therefor, in the absence of proof that there was negligence in the selection of the fellow-servant. In this case the question does not appear to have been raised whether there might not have been a liability on the part of the railroad for furnishing cars of unequal height which would be dangerous when brought together for coupling, in which case the defendant might be liable although the act of a fellow-servant contributed to cause the accident. See § 200, *post*, and Lawless v. Connecticut River R. R., 136 Mass. 1. Maintaining a "tell-tale" of insufficient height or undue rigidity, by coming in contact with

railroad train hand whose duties do not require him to ascertain the limits of the corporation's road has the right to assume that a side-track upon which he is customarily sent in the performance of the duty, and which is directly connected with the corporation's main line, is a part of its system; and he is entitled to the care and protection of the corporation while running over it.¹ It is the duty of a railway company to make and enforce rules for the carrying on of its business, such as, if faithfully observed, will protect its employees from unnecessary danger.² The obligation of a railroad company to furnish cars which shall be reasonably safe for its employees to run, attaches as to cars belonging to other corporations, which are run over the defendant road in the ordinary course of business. Accordingly, the railroad company is bound to inspect the cars coming on its road belonging to another company, just as it is to inspect its own cars. It is its duty as master to do this; and it may be responsible for the consequences of defects visible by careful inspection, and should either remedy such defects or refuse to receive such cars. The duty of examination, like the ordinary duty of furnishing suitable appliances, rests in the first instance upon the master; it is not to be avoided by delegation,³ and the degree of care to be exacted is to be measured by the danger to be anticipated and avoided.⁴ The duty of the railroad company in this respect rests upon like principles with that which, as being a carrier of passengers for hire, it owes to passengers in respect of accidents caused by the negligence of, or defective means of transportation furnished by, other carriers in privity with it.⁵ The duty of a railroad to inspect

which a freight brakeman is injured, is a breach of the duty of the railroad to provide safe and sufficient appliances. *Darling v. N. Y., Prov. & B. R. R.*, 17 R. I. 708, so as to a telegraph pole maintained by the company and so set as to endanger the safety of its employees. *Whipple v. N. Y., N. H. & H. R. R.*, 19 R. I. 587.

¹ *Grand Trunk Railway v. Tennant*, 21 U. S. App. 682.

² *Henion v. New York, N. H. & H. R. R.*, 51 U. S. App. 157.

³ *Union Pacific R. R. v. Daniels*, 152 U. S. 684; *Bailey v. Rome, W. & O. R. R.*, 139 N. Y. 302; *Railroad v. Reagan*, 96 Tenn. 128, and see § 193, *ante*.

⁴ *Goodrich v. New York Central & H. R. R. R.*, 116 N. Y. 398.

⁵ See §§ 46-50, *ante*, notes and cases cited.

cars applies to cars belonging to private owners which are to be hauled by it over its road.¹ If a railroad inspects a foreign car and finds concealed defects, it is its duty to give notice to its employees who are to run the car; but if the defects are obvious the employees undertaking to run the car may assume the risk of injury.²

§ 196. **Same Subject: As to Machinery.** — The master is bound to provide machines reasonably adapted to the purposes for which they are intended, and if the employee, without fault or notice on his own part, is injured by the negligence of his employer in this respect, he may recover for the injury.³ It does not matter whether the defective instrument or appliance causing the injury is the property of the employer, or not; so long as he has the possessory right to use it and it is under his control. Thus the fact that a car used by the defendant, and by a defect in which the plaintiff was injured, was furnished the defendant by a railroad corporation, the defendant being obliged to take whatever car was furnished him, will not, of itself, relieve the defendant from responsibility for the injury suffered by the plaintiff.⁴ But the master is not a guarantor of the safety of the machinery furnished by him,⁵ and is bound only to ordinary care and prudence in selecting and arranging it, and he has a right to use such machinery as the experience of other manufacturers has shown to be reasonably safe, even though better machinery may exist.⁶ For the

¹ *Elkins v. Penn. R. R.*, 171 Penn. St. 121. But it was held that the rule does not apply to companies or persons on whose sidings loaded cars are delivered for unloading by the owner of the sidings, even although such sidings are many in number and of great length. *McMullen v. Carnegie*, 158 Penn. St. 518.

² *Atchison, Topeka & S. F. R. R. v. Meyers*, 46 U. S. App. 226.

³ *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; *Indiana Car Co. v. Parker*, 100 Ind. 181; *O'Connor v. Adams*, 120 Mass. 427.

⁴ *Spaulding v. Flynt Granite Co.*, 159 Mass. 587.

⁵ *The France*, 20 U. S. App. 212; *Barber Asphalt Co. v. Odasz*, 20 U. S. App. 326; *Reilly v. Campbell*, 20 U. S. App. 334.

⁶ *Washington & Georgetown R. R. v. McDade*, 135 U. S. 554; *Faber v. Carlisle Manufg. Co.*, 126 Penn. St. 387; *Reese v. Hershey*, 163 Penn. St. 253; *Lehigh & Wilkes-Barre Coal Co. v. Hayes*, 24 W. N. C. 559; *Hayden v. Smithville Manufg. Co.*, 29 Conn. 548; *Richards v. Rough*, 53

fact that an appliance might have been safer does not, necessarily, prove that it was not reasonably safe,¹ and the test as to the suitability of an appliance is in the question whether a reasonably prudent man would furnish it under the circumstances; not merely whether it is in common use.² So where a servant is injured by the sudden starting of a machine which he is cleaning, if there is no defect in the machine and it is like similar machines in use elsewhere, and is in the same condition as it was when he entered on the employment, the mere fact that a certain contrivance, if attached to the machine, might have prevented its starting, is not evidence of negligence on the part of the master.³ The rule is different when the starting of the machine is caused by a defect in it, of which the master was, or ought to have been aware.⁴ An omission by an employer to provide against an alleged defect in a machine in ordinary use, which defect has not been specifically pointed out, will not justify the conclusion that the employer has been negligent.⁵ While it is the master's duty to see that the machinery is kept in safe condition, it is said that he is not bound to overlook the proper regulation and adjustment of parts which necessarily have to be adjusted in the course of ordinary use with regard to the particular work to be done.⁶ But the general obligation applies to all

Mich. 212; *Lamotte v. Boyce*, 105 Mich. 545; *Shadford v. Ann Arbor St. Railway*, 111 Mich. 390; *Harley v. Buffalo C. M. Co.*, 142 N. Y. 31; *Sisco v. Lehigh & H. R. R.*, 145 N. Y. 296; *Bonner v. Moore*, 3 Tex. Civ. App. 416; *Priestly v. Fowler*, 3 M. & W. 1; *Ormond v. Holland*, El. Bl. & El. 102; *Brown v. Accrington Co.*, 34 L. J. Ex. 208; *Potts v. Plunkett*, 9 Ir. C. L. R. 290; *Weems v. Mathieson*, 4 Macq. 215; *Searle v. Lindsay*, 31 L. J. C. P. 106. The rule is the same under the application of the Employers' Liability Act, 43 & 44 Vict. c. 42. See cases, *supra*.

¹ *Berning v. Medart*, 56 Mo. App. 443.

² *Geno v. Fall Mt. Paper Co.*, 68 Vt. 568.

³ *Ross v. Pearson Cordage Co.*, 164 Mass. 257.

⁴ *Donahue v. Drown*, 154 Mass. 21; *Mooney v. Conn. River Lumber Co.*, 154 Mass. 407; *Connors v. Durite Manuf. Co.*, 156 Mass. 163.

⁵ *Dingley v. Star Knitting Co.*, 134 N. Y. 552; *Bradley, J.*, dissenting.

⁶ *Eicheler v. St. Paul Furniture Co.*, 40 Minn. 263. See § 193, *ante*. The mere fact that machinery falls and injures the employee is held not sufficient to charge the employer with negligence. *Dobbins v. Brown*, 119 N. Y. 188. See § 111, 111 *a*, *ante*, and cases cited. As to the duty of the

parts; and if some of these require, in operation, frequent replacement, these, when adjusted, become a part of it, and a defect in one of them is a defect in the machine.¹ The duty to provide a safe place is not discharged by providing machinery or premises safe in the first instance, nor by providing for an inspection by a fellow-servant, and where the only inspection of engines is made by the engineers in charge of them, the engineers, for this purpose, represent the company.² In the absence of any statutory provision requiring machinery to be fenced, boxed, or otherwise protected as a precaution against accidents, the law imposes no legal duty upon the owner and employer in this respect, if the danger is manifest to a person of ordinary intelligence; since, in such a case, the danger, being apparent and incidental to the employment, is assumed by the employee.³ But if the employee is a person of tender years, or of manifest incapacity to understand the danger to which his work exposes him, the fact that the machinery was left unguarded may be competent upon the issue of the master's negligence.⁴ If an employee puts the appliances furnished him to an improper and dangerous use, the master is not responsible for the injurious results.⁵ As in employer to have machinery inspected from time to time, see cases cited. § 194, *ante*.

¹ *Toy v. U. S. Cartridge Co.*, 159 Mass. 313.

² *McDonald v. Mich. Cent. R. R.*, 108 Mich. 87. See § 220, *post*.

³ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India Manufg. Co.*, 113 Mass. 396; *Hale v. Cheeney*, 159 Mass. 268; *Townsend v. Langles*, 41 Fed. Rep. 919; *Schroeder v. Michigan Car Co.*, 56 Mich. 132; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *Sanborn v. Atchison, Topeka & S. F. R. R.*, 35 Kan. 292; but see *Reichla v. Gruensfelder*, 52 Mo. App. 43. See §§ 204 *et seq.*, *post*.

⁴ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *The Maharah, 40 Fed. Rep. 784*. See *Nadau v. White River Lumber Co.*, 76 Wis. 120. The English Factory Act, 7 & 8 Vict. c. 15, § 21, provides that "machinery near to which children or young persons are liable to pass or be employed, and all parts of the mill gearing in a factory, shall be securely fenced," and that such protection shall not be removed while the parts are in motion. This act is regarded by the English courts as being merely declaratory of a duty exacted by the common law. See *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 580.

⁵ *The Persian Monarch*, 14 U. S. App. 158; *Illinois Central R. R. v. Daniels*, 73 Miss. 258.

all cases in which the plaintiff's right to recover rests upon the assumption that the defendant has been negligent, so when the allegation is that the employer has furnished improper, or unnecessarily dangerous machinery, the question is one of fact, or a mixed question of law and fact,¹ and the burden of proof to establish the negligence of the defendant will rest upon the plaintiff.²

§ 197. **Obligation to provide a Suitable Place.**—It is the duty of the employer to provide reasonably safe places and structures in or upon which the employee may work without exposure to dangers not within the obvious scope of his employment;³ but the master does not guarantee the safety of such places or structures, nor, it seems, in the case of a building is he obliged to keep it in a safe condition at every moment of time during which the work is being done, when such safety depends upon the proper performance of the work by the employee and his fellow-workmen. Thus workmen, including the plaintiff, under charge of a foreman, and employed by the owner through his superintendent, were engaged

¹ *Myers v. Hudson Iron Co.*, 150 Mass. 125. In *Stringham v. Hilton*, 111 N. Y. 188, the court stated, as a general proposition, "that when an appliance or machine obviously dangerous has been in daily use for a long time, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of imprudence or carelessness." See *Burke v. Witherbee*, 98 N. Y. 562; *Laffin v. Buffalo & Southwestern R. R.*, 105 N. Y. 136. In *Stringham v. Hilton*, there appeared no ground to suppose that the machine, or its appliances, had become impaired by use, and it appeared that the machine was sufficient in its construction and was of a kind commonly used for like purposes. In *Myers v. Hudson Iron Co.*, the court observe that while the rule stated in *Stringham v. Hilton* might be justified as an instruction adapted to the facts of that case, it would be impracticable to express by a single formula a rule which should govern the widely different circumstances of other cases.

² See §§ 111, 111 *a*, *ante*, notes and cases cited; *Myhan v. Louisiana Electric Light & Power Co.*, 41 La. Ann. 964.

³ *Smith v. Peninsular Car Co.*, 60 Mich. 501; *Ryan v. Fowler*, 24 N. Y. 410, and other cases cited § 194, *ante*. Where the servant was injured by the caving in of a ditch being dug by the master to convey water-pipes for a city, and it appeared that there were no supports or braces furnished for the sides of the ditch, and experts testified that these were necessary for its safe construction, it was held that the master was guilty of negligence. *Doyle v. Baird*, 6 N. Y. Sup. N. E. Rep. 517 (1889).

in the erection of a building, with a cornice supported by sticks of timber passing through the wall, — which was thirteen inches thick, — and projecting sixteen inches, and to be bricked up at the sides, and, finally, over the tops of the timbers. When the wall had been laid to a level with, but not over, the timbers, the foreman of the carpenters directed the plaintiff to take a joist for the edge of the cornice, and to push it out to the ends of the projecting timbers. In doing this, the plaintiff stepped on the projecting part of one of the timbers, which turned over, whereby he fell and was injured. It was held that the owner of the building was not liable for the injury.¹ But where the danger arises from a defect inherent in the structure itself, and not existing by any act or fault of the employee or his fellow-servants, and is such as the employee has had no reasonable opportunity to detect, the employer is responsible. Thus it was held that the owner of a building in process of construction was liable to a carpenter working on the roof who was injured by the falling of the building caused by the walls being negligently built of insufficient thickness.² So if the material used in erecting scaf-

¹ *Armour v. Hahn*, 111 U. S. 313. Gray, J., said: "The usual course . . . was to put the timber in, and leave it in that way temporarily, and, afterwards build the wall up over it. It is not pretended that the . . . timber was in itself unsound or unsuitable for its purpose. If it was at the time insecure, it was either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building; or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were employed or paid by the same master, and were working in the course of their employment at the same place and time, with an immediate common object, the erection of the building, and therefore, within the strictest limits of the rule of law upon the subject, fellow-servants, one of whom cannot maintain an action for injuries, caused by the negligence of another, against their common master." It is apprehended that the decision of this case may well rest upon the former of the two grounds stated by the court: but, as to the second ground stated, it is to be observed that the later American authorities do not apply the English doctrine of fellow-servant to relieve the master from liability, in cases in which the injury has been caused by the failure of the master to supply suitable means and appliances for doing the work, it being held that the duty of the master in this respect is not to be avoided by delegation. See § 193, *ante*, notes and cases cited.

² *Giles v. Diamond State Iron Co.*, 8 Atl. Rep. 368 (Del. 1887). It is

folding is bad, and the master knew it but directed the material to be used, he is liable to his workmen, who, being themselves in the exercise of due care, are thereby injured.¹ But if the workman ought to have detected the defect, or if this was due to his own fault or, it is said, that of his fellow-workmen,² the master is not responsible.³ It is negligence to set a servant to work, without warning, in a place where the master knows that he will be exposed to an infectious disease,⁴ or upon a roof which the master knows to be unsafe;⁵ or for a railroad, without warning, to shunt detached and uncontrolled cars into a repair shop in which its employees are at work.⁶ The duty of the master, as to furnishing safe places and appliances, is held to be, not absolute, but relative.⁷ Thus the duty to provide a safe place does not impose upon the master the duty of keeping such a place safe under all the constantly changing conditions to which the performance of certain kinds of work, such as the construction of a sewer, may give rise, it not being reasonably possible to keep such work

held that one who hires an experienced carpenter to do work in an unfinished building is not bound to furnish artificial lights to prevent his wandering out of a regular passage-way and falling into a pitfall in another room. *Murphy v. Greeley*, 146 Mass. 196.

¹ *Roberts v. Smith*, 2 H. & N. 213; *Benzing v. Steinway*, 101 N. Y. 547; *Behm v. Ormond*, 58 Wis. 1.

² But see § 193, *ante*, and notes.

³ *Dewey v. Park*, 76 Mich. 631; *Kimmer v. Webber*, 151 N. Y. 417; *Peffer v. Cutler*, 83 Wis. 28; *McGorty v. So. N. E. Tel. Co.*, 69 Conn. 635. When a workman who was not a ship-carpenter or joiner, nor a mechanic by trade, and who knew nothing about the construction of scaffolding, was put into the hold of a vessel by his employer, a ship-builder, to remove the chips and rubbish underneath a scaffolding, it was held that he had a right to rely upon the superior knowledge of his employer, and upon the supposition that the latter had used reasonable care and prudence in erecting the scaffold. *Connolly v. Poillon*, 41 Barb. 366.

⁴ *Kleigel v. Aitkin*, 94 Wis. 432.

⁵ *Engstrom v. Ashland Co.*, 87 Wis. 166. Screwing down light and easily broken sashes in windows adjoining fire-escapes in a factory, and requiring them to be kept closed so as to maintain a high temperature necessary to carrying on the works to be done there, is not negligence on the part of the master. *Huda v. American Glucose Co.*, 154 N. Y. 474.

⁶ *Doing v. New York, O. & W. R. R.*, 151 N. Y. 579.

⁷ *Reed v. Stockmeyer*, 34 U. S. App. 727.

safe at every place and at every moment.¹ And when the work to be done is in a place necessarily dangerous, the obligation as to safe places manifestly cannot apply;² as where the employee is working upon an unfinished railroad,³ or is tearing down an insecure building.⁴ In such cases the ordinary doctrine of "employees' risk" must be taken to apply.⁵ But the master will not, under any circumstances, be relieved from the duty of exercising, as to the place in which the work is to be done, a degree of care proportioned to the circumstances of danger.⁶

§ 198. **Selection of Servants: General Rule.**—As to the measure of care to be required of the master in the selection and employment of his servants in order to relieve him of responsibility for injuries to one servant caused by the negligence of another, the same general rule obtains which is applied to fix the master's responsibility as to the structures and appliances provided by him for the doing of his work; that is, if the incapacity or recklessness of an agent is known to the master, or has existed so long, or under such circumstances, that he may reasonably be taken to have known it, he will be responsible.⁷ In other words, the master is bound to

¹ *Minneapolis v. Lundin*, 58 Fed. Rep. 525, 19 U. S. App. 245.

² *Finlayson v. Utica Mining Co.*, 32 U. S. App. 143; *Kennedy v. Manhattan R. R.*, 145 N. Y. 288; *Petaja v. Aurora Mining Co.*, 106 Mich. 463.

³ *Manning v. Chic. & W. M. R. R.*, 105 Mich. 260.

⁴ *Gulf, Colorado, &c. R. R. v. Jackson*, 27 U. S. App. 519.

⁵ See §§ 204 *et seq.*, *post*.

⁶ *Western Coal & Mining Co. v. Ingraham*, 36 U. S. App. 1; *Mather v. Rillston*, 156 U. S. 391.

⁷ *Gilman v. Eastern R. R.*, 13 Allen, 433; *Snow v. Housatonic R. R.*, 8 Allen, 441. The master does not warrant the fitness of his servants. *Ormond v. Holland*, El. Bl. & El. 102; *Tarrant v. Webb*, 18 C. B. 797; *Beaulieu v. Portland Co.*, 48 Maine, 291; *Wright v. New York Central R. R.*, 25 N. Y. 562; *Faulkner v. Erie R. R.*, 49 Barb. 324; *Columbus, C. & I. C. R. R. v. Troesch*, 68 Ill. 545. It is sufficient to charge the master if he ought to have ascertained the incompetence of the servant by the use of reasonable diligence, *Brickner v. New York Central R. R.*, 2 Lans. 508; *Byron v. New York State Printing & Tel. Co.*, 26 Barb. 39; *Harper v. Indianapolis & St. L. R. R.*, 47 Mo. 567; *Chicago, R. I. & Pac. R. R. v. Doyle*, 18 Kan. 58; but if he uses due diligence in this respect he is not liable. *Brown v. Maxwell*, 6 Hill, 592; *Toledo, Wabash & W. R. R.*

use reasonable care under the circumstances,¹ but it is generally said that he is not bound to more than ordinary care.² In cases in which it does not appear that the master was negligent in the original selection of the servant, he will generally be relieved from responsibility for isolated acts of momentary carelessness on the part of the servant whereby a fellow-servant is injured, since the master cannot reasonably be taken to have anticipated such a dereliction of duty on the

v. Durkin, 76 Ill. 395; *Coon v. Syracuse & Utica R. R.*, 5 N. Y. 492; *Brand v. Schenectady & Troy R. R.*, 8 Barb. 368, 383. So if the employer makes careful inquiry into the character and competency of his employees, and believes them competent, he will not be liable for their negligence. *Sizer v. Syracuse, B. & N. Y. R. R.*, 7 Lans. 67; *O'Donnell v. Allegheny Valley R. R.*, 59 Penn. St. 239; *Union Pacific R. R. v. Milliken*, 8 Kan. 647; *Moss v. Union Pacific R. R.*, 49 Mo. 167; *Baltimore v. War*, 77 Md. 593. In selecting employees the master has a right to rely on the statements, as to their fitness, made by applicants for employment; these being received and acted on in good faith by the master. *Stanley v. Chic. & N. W. R. R.*, 101 Mich. 202. The master has a right to assume average intelligence, for his years, of a boy of eighteen. *Roth v. Barrett Co.*, 96 Wis. 615. It has been held that the fact that a foreman was addicted to intoxication was not evidence that he was not fit for his position, if his habits did not render him unfit when he was sober; it appearing that he was sober on the day when the injury complained of occurred. *Harrington v. New York Central & H. R. R. R.*, 4 N. Y. Sup. N. E. Rep. 640 (1890), but see *Baltimore & Ohio R. R. v. Henthorne*, 43 U. S. App. 113, as cited, *post*. It is held that when there is evidence of incompetency on the part of the servant besides the act of negligence which caused the injury, the appearance of the servant may be evidence of incompetency, *Keith v. New Haven & Northampton Co.*, 140 Mass. 175; but that the rule will be otherwise when the only evidence of incompetency is the single act of negligence. *Peaslee v. Fitchburg R. R.*, 152 Mass. 155.

¹ *Witte v. Hague*, 2 Dow. & R. 33; *Faulkner v. Erie R. R.*, 49 Barb. 324; *Haskin v. New York Central & H. R. R. R.*, 65 Barb. 129; *Kroy v. Chicago, R. I. & Pac. R. R.*, 32 Iowa, 357; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Rohback v. Pacific R. R.*, 43 Mo. 187; *Thayer v. St. Louis, A. & T. H. R. R.*, 22 Ind. 26; *Chicago & Great Eastern R. R. v. Harney*, 28 Ind. 28; *Illinois Central R. R. v. Jewell*, 46 Ill. 99.

² *Wiggett v. Fox*, 36 E. L. & E. 486; *Caldwell v. Brown*, 53 Penn. St. 453; *Walton v. Bryn Mawr Hotel Co.*, 160 Penn. St. 3; *Huntsinger v. Trexler*, 181 Penn. St., 497; *Manville v. Cleveland & Toledo R. R.*, 11 Ohio St. 417. See *Wabash R. R. v. McDaniels*, 107 U. S. 454, as cited, *infra*.

part of a servant whom he had a right to believe faithful and competent. Thus it was held that the owners of a steamship were not liable for an injury which was caused by the engineers negligently permitting the machinery to get out of repair during a voyage, they having no reason to suspect the engineer of carelessness or incompetence.¹ It is clear that what will amount to proper care in the selection of a servant to perform a particular service, or in the retention of such a servant, he having been employed, will in a large part depend upon the nature and responsibility of such service. The greater the danger to be apprehended from the negligence or incompetence of the servant, the greater care is to be exercised in his selection or retention ; for example, a greater degree of care may be required in the selection or retention of a locomotive engineer, than of a fireman,² and it is negligence to retain a drunken engineer, the company knowing, or having reason to know, his habits.³ So it was held, since the same degree of care which a railway company should take in providing and maintaining its machinery must be observed in selecting and retaining its employees, that ordinary care on its part implies, as between it and its employees, not simply the degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed.⁴ Upon the general subject it may be said that the duty of the master to the servant is to be affirmatively and positively fulfilled, and it is said that it is his duty to keep himself informed of the continuing fitness of his servants.⁵ It is not enough that the master selects agents of approved skill and fitness, and confers upon them the power of selecting and purchasing materials and hiring workmen, since his duty in this respect cannot be avoided by delega-

¹ *Searle v. Lindsay*, 11 C. B. (N. S.) 429, and see *Tarrant v. Webb*, 18 C. B. 797.

² See *Northern Pacific R. R. v. Mares*, 123 U. S. 710, 719.

³ *Baltimore & Ohio R. R. v. Henthorne*, 43 U. S. App. 113.

⁴ *Wabash R. R. v. McDaniels*, 107 U. S. 454, opinion by Harlan, J.

⁵ *Baltimore & Ohio R. R. v. Henthorne*, 43 U. S. App. 113. See § 200, *post*.

tion.¹ If the agent carelessly places by the side of the servant another, unskilled and incompetent, and damage results to the servant in consequence, the master is liable; and this is so whether the incompetence or want of skill of the fellow-servant existed when he was hired, or has come upon him since, and he has been continued in the service with notice or knowledge, or the means of knowledge, on the part of the master, of the incompetence or unskilfulness.² Whether the master is negligent in his selection of servants, or of a sufficient number of them to do the work safely, is generally a question of fact.³

§ 199. **Same Subject: Burden of Proof: Presumptions.** — In conformity to the general rule heretofore stated, it is held that the burden to show that the master has employed incompetent or unsuitable servants, knowing them to be such, is upon the plaintiff;⁴ and as tending to prove the incompetence of the servant whose alleged negligence was the cause of the injury complained of his specific acts of negligence or want of skill may be shown.⁵ So general reputation of unfitness will be admissible in evidence, and may be sufficient to charge the employer with knowledge of the employee's incapacity, notwithstanding he may have been, in fact, ignorant of it; for ignorance will be negligence in cases in which

¹ *Donnelley v. Granite Co.*, 90 Maine, 110; *Northern Pacific R. R. v. Herbert*, 116 U. S. 642; *Mann v. Delaware & Hudson Canal Co.*, 91 N. Y. 495, and see § 193, *ante*, and cases cited.

² *Laning v. New York Central R. R.*, 49 N. Y. 521, opinion by Folger, J., explaining and limiting *Wright v. New York Central R. R.*, 25 N. Y. 562.

³ *Harrington v. Kansas City Cable Co.*, 60 Mo. App. 223; *Western Stone Co. v. Whalen*, 151 Ill. 472.

⁴ See § 111, *ante*, and cases cited, and also *Davis v. Detroit & Milwaukee R. R.*, 20 Mich. 105; *Brothers v. Carter*, 52 Mo. 372; *Gilman v. Eastern R. R.*, 10 Allen, 233; *Wright v. New York Central R. R.*, 25 N. Y. 562; *Potts v. Port Carlisle Dock & R. R.*, 8 W. R. 524; *Edwards v. Brighton, &c. R. R.*, 4 F. & F. 531; *Allen v. New Gas Co.*, 1 Ex. D. 251, 45 L. J. Ex. 668.

⁵ *Northern Pacific Railway v. Mares*, 123 U. S. 710; *Pittsburg, Fort Wayne & Chicago R. R. v. Ruby*, 38 Ind. 294, but see *Frazier v. Pennsylvania R. R.*, 38 Penn. St. 104.

proper inquiry would have elicited sufficient information as to the qualifications of the servant and the exercise of proper prudence required that such inquiries should be made.¹ The servant has a right to assume that his employer has used due care in the selection and employment of his fellow-servants; and the question whether in any case it was the duty of the injured servant to refuse to work with a negligent fellow-servant is a question for the jury, considering the circumstances.² If he continues his employment, knowing the incompetency or carelessness of his fellow-servant, he cannot recover unless he had reason to believe that within a reasonable time the incompetent servant would be discharged or placed in a position where he could not injure the plaintiff.³

§ 200. **Same Subject: Direct Personal Supervision of Employees not required, *semble*.**—It is generally held that the law does not require of the master, at least in the absence of circumstances which ought to put him upon inquiry, any special supervision of his employees directed to the prevention of accidents to others caused by the carelessness of such servants in doing their work.⁴ Thus it was held that, although it is the duty of a railway company to exercise all reasonable care in procuring sound machinery and faithful and competent employees, and although it is liable to its servants for the neglect of this duty, yet, after it has procured such machinery and employees, it is not liable to a servant for injuries occasioned by the neglect of any of his co-servants employed in the same general business of operating the road, even although such negligent servant is of superior grade to the injured servant.⁵ It is clear that the rule thus expressed must exclude, as between the master and his employees, the

¹ *Gilman v. Eastern R. R.*, 10 Allen, 233; *Davis v. Detroit & Milwaukee R. R.*, 20 Mich. 105.

² See cases cited *supra*, and also *Northern Pacific Railway Co. v. Mares*, 123 U. S. 710; *Union Pacific R. R. v. Fort*, 17 Wall. 553, 557.

³ *Laning v. New York Central R. R.*, 49 N. Y. 521; *Haskin v. New York Central & H. R. R. R.*, 65 Barb. 129; *Frazier v. Pennsylvania R. R.*, 28 Penn. St. 104; *Wiggins Ferry Co. v. Blakeman*, 54 Ill. 201.

⁴ See §§ 192, 198, *ante*, notes and cases cited.

⁵ *Hard v. Vermont & Canada R. R.*, 32 Vt. 473.

application of a similar rule to that heretofore stated as being held in the later American cases, which makes it the duty of the master not only to furnish safe and adequate machinery and appliances for the doing of the work, but also to exercise a cautious supervision to see that such machinery and appliances remain safe and suitable for the purpose for which they were furnished.¹ It is believed that an analogous rule has not been applied in respect of the master's duty of supervision over his employees; and it is apprehended that in most cases ordinary care requires of him only that he exercise, in the first instance, a prudent discretion in selecting his servants, and cease to employ them when his attention has been called to their imprudence or incompetence; as, for example, by the complaints of their fellow-servants.² The reason of the distinction between the two classes of cases would seem to be that, having selected prudent servants, the master has a right to suppose that these will act in the employment as intelligent agents; and, further, since in the case of an injury caused by negligence the law looks to find the last negligent act in the chain of causation, done by an intelligent agent, the negligent act of the servant which directly causes the injury is to be taken for the proximate cause of such injury.³ It would seem clear, however, that if the neglect of the master to see that the machines or appliances are in proper order is a moving cause of the accident, although the negligence of the servant may also have been a contributing cause, the master may be liable, since the master cannot avoid responsibility by delegating it.⁴ It is clearly negligence for the master to employ an insufficient number

¹ See § 193, *ante*, notes and cases cited.

² See § 212, *post*.

³ See § 100, *ante*, notes and cases cited.

⁴ See §§ 192, 193, *ante*, 201, *post*, and cases cited; *Ford v. Fitchburg R. R.*, 110 Mass. 240. A different rule seems to be implied in *Hard v. Vermont & Canada R. R.*, *supra*. In that case, which was an action brought for injuries to a railway employee, the accident was caused by the negligence of a fellow-servant, conjoined with a defect in the locomotive upon which the plaintiff was employed, and the court said that it was no part of the duty of the corporation to inspect the condition of its locomotives.

of servants to do the work safely,¹ or to retain in his employment an incompetent servant after notice of his incompetence.²

§ 201. **Contributing Negligence of Fellow-servant not to bar Recovery : Negligence of Third Persons.** — From the application of the general rule heretofore stated, that a person injured by the fault of another, without which fault the injury could not have occurred, is not to be deprived of his remedy because the fault of another person not in privity with him also contributed to the injury,³ it follows that if a master sets his servant to work in an unsafe place;⁴ or in a dangerous employment without providing for the servant's protection such safeguards as reason and common experience have shown to be necessary for that purpose, the master will remain responsible for his negligence in this respect, although the negligence of the plaintiff's fellow-servant contributed to produce the injurious result.⁵ And this is so, although the injury is the joint result

¹ Thus it was held that the fact that a defendant railroad employed but one brakeman on a train of ten loaded cars, while running down a heavy grade, was a circumstance tending to show negligence in an action for injuries brought by another employee against the corporation. *Georgia Pacific R. R. v. Propst*, 7 So. Rep. 635 (Ala. 1890). But an employee continuing to work, knowing that the number of hands furnished to do the work is insufficient, takes the risk of injury. *Richmond & D. R. R. v. Mitchell*, 92 Ga. 77; *Richmond & D. R. R. v. Worley*, 92 Ga. 84.

² *Senior v. Ward*, 28 L. J. Q. B. 139, and see cases cited in §§ 198, 199, *ante*.

³ See § 103, *ante*, and cases cited.

⁴ *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915, 6 C. C. A. 636, and see *Little Rock & M. R. R. v. Moseley*, 56 Fed. Rep. 1009, 6 C. C. A. 225; *Union Pacific R. R. v. Callaghan*, 56 Fed. Rep. 988, 6 C. C. A. 205.

⁵ *Cayzer v. Taylor*, 10 Gray, 274; *Holden v. Fitchburg R. R.*, 129 Mass. 268, 276; *Ford v. Fitchburg R. R.*, 110 Mass. 240; *Morrissey v. Hughes*, 65 Vt. 533; *Houston & T. C. R. R. v. Lowe*, 11 S. W. Rep. 1065 (Tex. 1889); *Searle v. Lindsay*, 11 C. B. N. S. 429; *Terre Haute & Ind. R. R. v. Mansberger*, 24 U. S. App. 551; *Hankins v. New York, L. E. & W. R. R.*, 142 N. Y. 416; *McDonald v. Mich. Cent. R. R.*, 108 Mich. 7; *Irmer v. St. Louis Brewing Co.*, 69 Mo. App. 17; *Deweese v. Meramec Iron Mining Co.*, 128 Mo. 423; *Norfolk & Western R. R. v. Nuckol*, 91 Va. 193; *San Antonio & Aransas Pass. R. R. v. Harding*, 11 Tex. Civ. App. 497; *Galveston, H. & San A. R. R. v. Sweeney*, 14 Tex. Civ. App. 216,

of the negligence of a servant of the master, not a fellow-servant of the plaintiff, and of the fault of a fellow-servant.¹ When in the course of an employment the acts of third persons, not employed by the master, may render the service more dangerous, and such acts and their character are understood by the servant, and to his knowledge are not under the supervision of the master; the latter will not be responsible for the injurious results of such acts.² But it is apprehended that the servant will not, in such cases, assume the absolute risk of injury; but that the fact of his continuing to work under such conditions will bear upon the question of his contributory negligence.³

SECTION II.

TO INSTRUCT EMPLOYEE.

§ 202. **Generally : Illustrations of the Rule** — Since it is the duty of the master to use due diligence to see that the servant is not exposed to unnecessary risks in the course of his employment, he is bound, before an employee is put in charge of dangerous machinery with which he is not acquainted, to instruct and qualify him for his duty; ⁴ and so, if the employee

and see cases cited § 198, *ante*. When several concurring causes contribute to an accident, and each is an efficient cause, without the operation of which the accident could not have happened, it may be attributed to any or all of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened. *Ring v. Cohoes*, 77 N. Y. 83, and see §§ 97–100, *ante*, notes and cases cited.

¹ *Coppins v. New York Central & Hudson River R. R.*, 48 Hun, 292; *Cincinnati, H. & D. R. R. v. McMullen*, 117 Ind. 439.

² *Hardy v. Shedden Co.*, 47 U. S. App. 362.

³ See § 207 *et seq.*, *post*.

⁴ *Brennan v. Gordon*, 118 N. Y. 489; *Fredenburg v. Northern Central R. R.*, 114 N. Y. 582; *Connolly v. Poillon*, 41 Barb. 366; *Thall v. Carnie*, 5 N. Y. Sup. N. E. Rep. 244 (1889); *Piggott v. Hanchett*, 8 N. Y. Sup. N. E. Rep. 731 (1890); *Noyes v. Smith*, 28 Vt. 59; *Cleveland Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283; *Missouri Pacific R. R. v. Callbreath*, 66 Tex. 526; *Union Pacific R. R. v. Fort*, 17 Wall. 553; *Sullivan v. India Manuf'g Co.*, 113 Mass. 396; *Rummel v. Dilworth*, 131 Penn. St. 509; *Chicago & Northwestern R. R. v. Ward*, 61 Ill. 130; *McDougall v.*

be set to work in a dangerous place, he being not acquainted with the danger, and this not being obvious to ordinary inspection.¹ And if the master delegates a fellow-servant of the employee to instruct and qualify the latter for the dangerous service, he is bound to select a competent instructor, and he will be liable for the incompetence, forgetfulness, or negligence of the instructor, if by reason of it the employee suffers injury.² In such a case it is not a defence that the injury to the employee was caused by the negligence of his fellow-servant; for the master's servant who instructs the employee stands, for this purpose, in the place of the master, and the latter is liable for his default.³ It is the duty of the master to inform his employee of the existence of any suddenly occurring danger or defect, of which the master is or ought to

Ashland Co., 97 Wis. 382; *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232; *Pullman Palace-Car Co. v. Harkins*, 5 C. C. A. 326; *Bohn Manuf'g Co. v. Erickson*, 5 C. C. A. 341.

¹ *Lofrano v. New York & Mt. Vernon Water Co.*, 55 Hun, 452; *Nadau v. White River Lumber Co.*, 76 Wis. 120; *Roth v. Northern Pacific Lumbering Co.*, 18 Or. 205; *Missouri Pacific R. R. v. White*, 76 Tex. 103; *Myhan v. Louisiana Electric Light & Power Co.*, 41 La. Ann. 964; *Alabama &c. Co. v. Pitts*, 98 Ala. 285.

² *Flike v. Boston & Albany R. R.*, 53 N. Y. 549; *Paulmier v. Erie R. R.*, 34 N. J. L. 151; *Wheeler v. Wason Manuf'g Co.*, 135 Mass. 294; *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214; *La Fortune v. Jolly*, 167 Mass. 170; *Gerrish v. New Haven Ice Co.*, 63 Conn. 9; *Lebbering v. Struthers*, 157 Penn. St. 312; *Devitt v. Union Pacific R. R.*, 50 Mo. 302; *Williams v. Clough*, 27 L. J. (N. S.) Ex. 325.

³ *Brennan v. Gordon*, 118 N. Y. 489; *Mann v. Delaware & Hudson Canal Co.*, 91 N. Y. 500; *Loughlin v. State*, 105 N. Y. 159; *Union Pacific R. R. v. Fort*, 17 Wall. 553. In *Yeaton v. Boston & Lowell R. R.*, 135 Mass. 418, the duty of instructing the employee having been delegated to the defendant's foreman, the court said: "If there was a neglect . . . to give . . . information to the plaintiff by one upon whom the duty has been devolved by the master, such neglect is to be treated as that of a fellow-servant," and it was held that, on this ground, the plaintiff could not recover. The doctrine held in this case seems to be opposed to the general tenor of authority, and to the opinion of the same court in *Wheeler v. Wason Manuf'g Co.*, 135 Mass. 294, as cited above. See, also, *Avilla v. Nash*, 117 Mass. 318; *Durgin v. Munson*, 9 Allen, 396; *Holden v. Fitchburg R. R.*, 129 Mass. 268; *Myers v. Hudson Iron Co.*, 150 Mass. 125; *Rogers v. Ludlow Manuf'g Co.*, 144 Mass. 198, 202, as cited § 193, *ante*; *Union Pacific R. R. v. Fort*, 17 Wall. 553, 559, as cited § 207, *post*.

be informed, but of which the employee is ignorant, as when an essential change is made in a dangerous machine, without the knowledge of the servant.¹ So the employee has a right to rely upon the warnings and signals customarily given in the conduct of the business, and if the master fail to give these he is negligent.² But it is not the master's duty to give warning of dangers of which the employee is, or ought to be, informed.³ The question whether the master is to be charged with constructive notice of the existence of a defect or danger is, in doubtful cases, one of fact; and the burden to show notice, actual or constructive, is upon the plaintiff.⁴ It is to be observed that there is a class of cases in which it is a duty of the master properly to instruct the servant, not only to secure the safety of the latter, but to protect the public from the injuries which may result from the servant's want of skill. In such cases failure to instruct the servant is negligence for which the master is liable to third persons.⁵ Applying the general rules stated, where the plaintiff, while at work for the defendant, was injured by a bar of steel falling from a pile of similar bars piled by his co-workmen, and there was no evidence that the defendant's agents knew, or could have known, of the defective piling, or that the defendant had been negligent in the selection of his workmen, it was held that negligence on the part of the defendant was not shown.⁶ But

¹ *Ryan v. Chelsea Paper Manuf'g Co.*, 69 Conn. 454; *Pullman Palace-Car Co. v. Laack*, 143 Ill. 242. A printed notice posted in a factory that a particular machine is dangerous, and that care must be used in operating it, is notice of nothing except the dangers of a perfect machine, and conveys no warning of additional dangers caused by a break in the machine. *Blumenthal v. Craig*, 53 U. S. App. 8.

² *Anderson v. Northern Mill Co.*, 42 Minn. 424; *Itis v. Chicago, M. & St. P. R. R.*, 40 Minn. 273; *Howard v. Delaware & Hudson Canal Co.*, 40 Fed. Rep. 195, and see § 152, *ante*, notes and cases cited.

³ *Lehigh & Wilkes-Barre Coal Co. v. Hayes*, 24 W. N. C. 559.

⁴ *Clough v. Hoffman*, 132 Penn. St. 626; *O'Donnell v. Baum*, 38 Mo. App. 245; *Oehme v. Cook*, 7 N. Y. Sup. N. E. Rep. 764 (1890); *Sherman v. Menominee River Lumber Co.*, 77 Wis. 14; *Central R. R. & Banking Co. v. Kent*, 84 Ga. 351; *Rummel v. Dilworth*, 111 Penn. St. 343, 131 Penn. St. 509.

⁵ See §§ 38, 113, 118, *ante*, and also *Lannen v. Albany Gas Light Co.*, 44 N. Y. 459.

⁶ *Nash v. Nashua Iron & Steel Co.*, 62 N. H. 406.

where a pile of sleepers had been left too near the track of the defendant's railroad, and the defendant's brakeman was thereby injured, and the evidence was conflicting as to the time during which the pile had been there, the question of the defendant's negligence was left to the jury.¹ A night oiler employed by an electric light company was instantly killed, while in the discharge of his duty, by coming in contact with wires on or near the floor of the dynamo-house. It appeared that the company had been notified of the dangerous arrangement of the wires, and that the safer way would be to run them on the ceiling. It did not appear that the deceased had been told by the company's agents of the dangerous character of the wires among which he had to move, or that he understood the danger. It was held that the company was liable for his death, and the court stated the law applicable to the case in substance as follows: A master who carries on an extraordinarily dangerous undertaking, such as the generation and distribution of electricity, is bound to know the character and extent of the danger, and to notify the same to the servant specially and unequivocally, so as clearly to be understood by him. The absence of actual knowledge is no exculpation; the servant is not required to know latent but only patent defects, and he has a right to assume superior knowledge in his employer, to rely on his prudence and judgment, and to believe that he will not, unnecessarily, expose the employee to danger.² The fact that a servant was ignorant that he had a malady which as to him rendered certain labor dangerous, and that his master knew that he had such malady, is not sufficient to charge the master with negligence in setting the servant to do such work, unless it also appear that the master knew that the servant was ignorant that he had such malady.³ As the real question in this class of cases always is whether the defendant was negligent in failing properly to instruct his servant, it is apprehended that ordinary rules are to be applied in determining it; that is, the question will be one of

¹ *Babcock v. Old Colony R. R.*, 150 Mass. 467.

² *Myhan v. Louisiana Electric Light & Power Co.*, 41 La. Ann. 964. See comments on this case in *Townsend v. Langles*, 41 Fed. Rep. 919.

³ *Crowley v. Appleton*, 148 Mass. 93.

fact, unless the facts in evidence be undisputed and conclusive so as to justify the court in directing a verdict in accordance therewith.¹ In determining whether in any case the instructions were sufficient, the jury are to take into consideration the youth, inexperience, degree of mental capacity, or other circumstances known, or which ought to have been known to the master, and bearing upon the question of the employee's ability to understand his employment and the dangers attending it.²

§ 203. **Qualifications and Limitations of the Rule: Infant Employees.** — In the absence of circumstances to put him upon inquiry, the master has a right to assume that his employee is possessed of ordinary intelligence, and that he knows those facts of common experience with which persons of his age and capacity are generally familiar.³ Thus while the fact that the employee is an infant makes it the duty of the master, generally, to exercise a greater measure of care in setting him about his employment than would be required in the case of an adult workman set to do the same work, yet the employer is not bound to instruct the employee, merely because he is an infant.⁴ It is said: "In hiring a boy twelve years of age,

¹ *Neilon v. Marinette & M. Paper Co.*, 75 Wis. 579; *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152; *Ogley v. Miles*, 8 N. Y. Sup. N. E. Rep. 270 (1890).

² *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *O'Connor v. Adams*, 120 Mass. 427; *Hanson v. Ludlow Manuf'g Co.*, 162 Mass. 187; *Hickey v. Taaffe*, 105 N. Y. 26, 36; *Jones v. Florence Mining Co.*, 66 Wis. 268; *Ogley v. Miles*, 8 N. Y. Sup. N. E. Rep. 270 (1890).

³ *King v. Boston & Worcester R. R.*, 9 Cush. 112; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 585; *Sullivan v. India Manuf'g Co.*, 113 Mass. 396; *Richstain v. Washington Mills Co.*, 157 Mass. 538; *De Graff v. New York Central & H. R. R. R.*, 76 N. Y. 125; *Hickey v. Taaffe*, 105 N. Y. 30; *Chicago Brick Co. v. Reinneiger*, 140 Ill. 334.

⁴ *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152. But where a boy twelve years old was of less than the average intelligence of boys of that age, which fact the employer knew, and the employer sent him, in haste, into the close neighborhood of dangerous gearing, in an illy lighted place, he having worked in sight of, but not upon, the dangerous machine, before, it was held that the question of the employer's negligence was for the jury. *Ibid.* See *Crowley v. Pacific Mills*, 148 Mass. 228; *Glover v. Dwight Manuf'g Co.*, 148 Mass. 22; *Probert v. Phipps*, 149 Mass. 258;

and apparently of average intelligence, an employer is not called upon to tell him that if he holds his hand in the fire it will be burned, or strikes it with a sharp instrument it will be cut, or thrusts it between the teeth of a revolving cog-wheel in the gearing of a mill it will be crushed. From infancy, and through childhood, as well as in later life, we are all making observations and experiments with material substances, and every person of ordinary faculties acquires knowledge, at an early age, of those familiar facts which force themselves on our attention through our senses."¹ Nor is the master bound to instruct an infant to avoid dangers into which there is no reason to suppose he will fall. Thus where an infant working over machinery accidentally slipped, and in order to save himself from falling threw out his hand, which was caught between a pair of cog-wheels, which, in the discharge of his duty, he was not obliged to touch, nor to approach nearer than nine inches; it was held that the master was not liable for the injury on account of his failure to caution the plaintiff against such an accident.² And, whether the employee be an infant or an adult, his master is not bound to instruct him as to the dangers of the work when these are not extraordinary and the employee, being of ordinary intelligence, has had a sufficient opportunity to become familiar with them, or has been sufficiently instructed elsewhere, or by some one else.³ If the employee is so young that, even after full in-

§ 201, *ante*. So an infant of tender years may recover from his master for injuries received from machinery which his master negligently ordered him to oil, and the dangerous nature of which he could not understand even if he used due care according to his years. *Hinckley v. Horadowsky*, 133 Ill. 359.

¹ *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152. See *Ruchinsky v. French*, 168 Mass. 68.

² *Buckley v. Gutta Percha & Rubber Manuf'g Co.*, 113 N. Y. 540. See *Connolly v. Eldredge*, 160 Mass. 566. Where the plaintiff, a brakeman, was but sixteen years of age, it was held that the defendant must show, in order to avoid the imputation of negligence, that the plaintiff possessed the capacity and experience to do the work required of him in safety, although there was otherwise nothing in the case to show that the defendant was negligent. *Gulf, C. & S. F. R. R. v. Jones*, 76 Tex. 350.

³ *East & West R. R. v. Sims*, 80 Ga. 867; *Neilon v. Marinette & M. Paper Co.*, 75 Wis. 579; *Prentiss v. Kent Furniture Manuf'g Co.*, 63

structions, he wholly fails to understand them or to appreciate the danger of the employment, then he is too young to be set at such an employment, and the employer puts or keeps him at such work at his own risk.¹ The questions whether the infant employee was of sufficient age, judgment, and capacity to do the work upon which he was employed, and whether the instructions given him by his master were reasonably sufficient, are ordinarily for the jury.²

SECTION III.

OF THE DOCTRINE OF EMPLOYEE'S RISK.

§ 204. **General Rule.** — By the common law, it is a part of the implied contract between the employer and the employee that the latter assume the ordinary risks of the employment, which are apparent, and which he has the opportunity to detect.³ The principle is that where the servant has as good an

Mich. 478; *Gordon v. Reynolds Card Manuf'g Co.*, 47 Hun, 278; *Coullard v. Tecumseh Mills*, 151 Mass. 85; *Whitelaw v. Memphis & Charleston R. R.*, 16 Lea, 391; *Evans v. American Iron & Tube Co.*, 43 Fed. Rep. 519. The master is bound to instruct, for a reasonable time, one whom he selects to run an elevator, such person being without experience in such employment. *Brennan v. Gordon*, 118 N. Y. 489. It was held to be negligence to set a girl thirteen years old to run and clean a spinning-frame in a cotton factory without instructing her how to do the work. *Glover v. Dwight Manuf'g Co.*, 148 Mass. 22.

¹ *Hickey v. Taaffe*, 105 N. Y. 26, 36.

² *Hickey v. Taaffe*, *supra*; *Neilson v. Coal & Iron Co.*, 167 Penn. St. 256; *Wynn v. City & Sub. R. R.*, 91 Ga. 344; *Central R. R. v. Golden*, 93 Ga. 510, and see § 202, *ante*, and cases cited.

³ *Bohn v. Havermeyer*, 114 N. Y. 296; *Appel v. Buffalo, N. Y. & P. R. R.*, 111 N. Y. 550; *Odell v. New York Central & H. R. R. R.*, 120 N. Y. 323; *Ryan v. Long Island R. R.*, 51 Hun, 607; *Goltz v. Milwaukee, L. S. & W. R. R.*, 76 Wis. 136; *Smith v. Peninsular Car Works*, 60 Mich. 501; *Meizer v. Peninsular Car Co.*, 76 Mich. 94; *Pederson v. Rushford*, 41 Minn. 289; *Hoffman v. Clough*, 124 Penn. St. 505; *Carbine v. Bennington & Rutland R. R.*, 61 Vt. 348; *Nelling v. Industrial Manuf'g Co.*, 78 Ga. 260; *Central R. R. v. Smith*, 82 Ga. 236; *South West Virginia Improvement Co. v. Andrew*, 86 Va. 270; *Buzzell v. Laconia*

opportunity as the master to ascertain and avoid the danger for himself, he will have no recourse against the master in case he is injured thereby;¹ and he accepts the employment upon this implied condition.² Inasmuch as the essence of the negligence is a failure to take proper precautions against danger and the risk of injury, it follows that, if the defendant is negligent in this particular, the plaintiff who voluntarily assumes the risk with a full understanding of it is negligent

Manuf'g Co., 48 Maine, 113; *Indianapolis R. R. v. Love*, 10 Ind. 554; *Fifield v. Northern R. R.*, 42 N. H. 225; *Byron v. New York Telegraph Co.*, 26 Barb. 39; *Mad River & L. E. R. R. v. Barber*, 5 Ohio St. 541; *McGatrick v. Wason*, 4 Ohio St. 566; *Missouri Pacific R. R. v. Lehmberg*, 75 Tex. 61; *Easton v. Houston & T. C. R. R.*, 39 Fed. Rep. 65; *Townsend v. Langles*, 41 Fed. Rep. 919; *Watson v. K. & T. Coal Co.*, 52 Mo. App. 366; *Foley v. Jersey City El. Light Co.*, 54 N. J. L. 411; *Beckman v. Consol. Coal Co.*, 90 Iowa, 352; *Peterson v. Sherry Lumber Co.*, 90 Wis. 83; *Int. & Great North. R. R. v. Beasley*, 9 Tex. Civ. App. 569; *Foley v. Pettee Machine Works*, 149 Mass. 294; *Hatt v. Hay*, 144 Mass. 186; *Pratt v. Prouty*, 153 Mass. 333; *Tinkham v. Sawyer*, 153 Mass. 485; *De Souza v. Stafford Mills*, 155 Mass. 476; *Rood v. Lawrence Manuf'g Co.*, 155 Mass. 590; *Gleason v. New York & N. E. R. R. Co.*, 157 Mass. 68; *Priestly v. Fowler*, 3 M. & W. 1; *Clarke v. Holmes*, 7 H. & N. 937. As expressed by Lord Coleridge, the rule is that entering into the contract of service the servant contracts, as between himself and his employer, to run those risks as part of the service for which he is to receive pay or reward. *Rourke v. White Moss, &c. Co.*, 1 C. P. D. 556, 559, 46 L. J. C. P. 283. And having once entered into the employment, he will be bound to perform all the services necessarily incident to that branch of the work which he has contracted to do, although at more or less personal risk. *Griffiths v. London & St. Kath. Docks Co.*, 12 Q. B. D. 493, 495, 13 Q. B. D. 259, 53 L. J. Q. B. 105. The servant is not bound by his contract to undertake any service out of the line of the employment for which he was hired, and if, at the master's order, he undertake such a service, it being obviously dangerous, he assumes the risk of injury thereby. *Lax v. Mayor of Darlington*, 5 Ex. D. 28, 49 L. J. Ex. 105; *Potts v. Plunket*, 9 Ir. C. L. R. 290; *Riley v. Baxendale*, 30 L. J. Ex. 87; *Ogden v. Rummens*, 3 F. & F. 751. See § 207, *post*.

¹ *Woodman v. Metropolitan District Railway*, L. R. 2 Ex. D. 384; *Dynen v. Leach*, 26 L. J. (N. S.) Exch. 221; *Ogden v. Rummens*, 3 F. & F. 751; *Haley v. Case*, 142 Mass. 316; *Monaghan v. New York Central & H. R. R. R.*, 45 Hun, 113; *Powers v. New York, L. E. & W. R. R.*, 98 N. Y. 274; *Central R. R. & Banking Co. v. Dickson*, 82 Ga. 629; *McGlynn v. Brodie*, 31 Cal. 376.

² *Seymour v. Maddox*, 16 Q. B. 326.

also.¹ And in determining whether the risks of the employment are obvious, and so to be assumed by the employee, the question is not whether he has actually observed, and by a conscious act of the will assumed the risks, but whether the risks are incident to the employment, and are such as, having regard to the age, intelligence, and experience of the employee, he ought to have appreciated.² The rule applies if the employee is a person of ordinary intelligence, although inexperienced,³ and although the negligence of the employer may contribute to cause the injury complained of.⁴ But the employee is not bound to anticipate, nor does he assume the risk of injury from, extraordinary dangers;⁵ and he is not bound, as matter of law, exactly to know and appreciate the risk of the work in which he is engaged.⁶ The question whether the danger to which the employee was exposed was fairly to be anticipated in the course of his employment, is, in doubtful cases, for the jury,⁷ but where the uncontradicted testimony shows that the danger was obvious and known to the servant, the court may instruct the jury that he cannot recover.⁸

¹ *Burgess v. Davis Sulphur Co.*, 165 Mass. 71.

² *Kenney v. Hingham Cordage Co.*, 168 Mass. 278.

³ *Alexander v. Louisville & Nashville R. R.*, 83 Ky. 589.

⁴ *Balle v. Detroit Leather Co.*, 73 Mich. 158; *Lord v. Pueblo Smelting & Mining Co.*, 12 Col. 390.

⁵ *Smith v. Peninsular Car Works*, 60 Mich. 501. Thus where an accident caused by a defective car occurred while the cars were moving slowly, the fact that such an accident might have been anticipated, had the cars been moving fast, though the car was in good order, does not bring the accident within the ordinary risks of a brakeman's employment. *Goodrich v. New York Central & H. R. R. R.*, 116 N. Y. 398. It has been held that the throwing of a barrel from a fourth-story window so as to strike and kill a fellow-servant is not such an unforeseen and extraordinary act of carelessness as not to come within the risks of the employment assumed by the deceased. *Brodeur v. Valley Falls Co.*, 16 R. I. 448.

⁶ *Lawless v. Connecticut River R. R.*, 136 Mass. 1; *Ferren v. Old Colony R. R.*, 143 Mass. 197.

⁷ *Huddleston v. Lowell Machine Shop*, 106 Mass. 286; *Moore v. St. Louis Wire Mill Co.*, 55 Mo. App. 491.

⁸ *Anderson v. Clark*, 155 Mass. 368; *Seymour v. Maddox*, 16 Q. B. 326. Where a plaintiff, who was acting foreman in the yard of the defendant's saw-mill, but had nothing to do with the machinery of the mill, was injured by a defect in such machinery, it was held that he was not to be

Minors are ordinarily held to assume those risks of the employment which are obvious to them;¹ but, in estimating the risk, the minor is to be held only to that measure of care which is reasonably to be expected in a person of his age and capacity.² Within certain limits, the law presumes that all persons of ordinary intelligence have knowledge of the destructive forces in nature, and that, if their employment exposes them to danger from such forces, they take the risk of injury.³ Thus all men are taken to understand that fire will burn, and water drown. But there are many facts of science which do not come within the range of ordinary knowledge; and unless the employment itself teaches them, the employee will not be taken to know them, nor be bound to anticipate danger therefrom. Thus, where one was employed to remove hot slag from a furnace in close proximity to water, it was held that he should not be presumed to know that if the slag came into contact with the water a dangerous explosion might follow.⁴

presumed to have known that the machinery was dangerous. *Sanborn v. Madera Flume & Trading Co.*, 70 Cal. 261. For a case in which it was held that a plaintiff did not accept the risk of injury by the hoisting machinery of an elevator which he was employed to operate, he having been engaged in such employment only six hours, see *Kern v. De Castro & Donner Sugar Ref. Co.*, 5 N. Y. Sup. N. E. Rep. 548 (1889).

¹ *Zurn v. Tetlow*, 134 Penn. St. 213; *Rummel v. Dilworth*, 111 Penn. St. 343, 131 Penn. St. 509; *Smith v. Irwin*, 51 N. J. L. 507; *Dunn v. McNamee*, 59 N. J. L. 498; *Kaufhold v. Arnold*, 163 Penn. St. 269; *Coins v. Chicago, R. I. & Pacific R. R.*, 37 Mo. App. 676; *De Graff v. New York Central & H. R. R. R.*, 76 N. Y. 125; *Hickey v. Taaffe*, 105 N. Y. 26; *Sullivan v. India Manuf'g Co.*, 113 Mass. 396.

² *McCarragher v. Rogers*, 120 N. Y. 526; *Smith v. Irwin*, 51 N. J. L. 507; *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455. Under a statute which provides that a person not an idiot shall be considered of sound mind who has reached the age of fourteen, or, before that age, if he knows the difference between good and evil, and that an infant under ten shall not be considered guilty of any crime or misdemeanor, it was held to be a question of fact whether a boy of thirteen was of sufficient discretion to assume the risk of a dangerous employment. *Rhodes v. Georgia Railroad & Banking Co.*, 84 Ga. 320.

³ *Worlds v. Georgia R. R.*, 98 Ga. 288.

⁴ *McGowan v. La Plata Mining & Smelting Co.*, 3 McCrary, 393; and see *Myhan v. Louisiana Electric Light & Power Co.*, 41 La. Ann. 964, as cited § 202, *ante*.

§ 205. **Applications of the General Rule.**—It is obvious that the positive risk assumed by the employee will be greater or less, according as his employment is in its nature more or less hazardous. Thus, an experienced machinist takes his risk of being injured by dangerous machinery used in his employment, although it might be made less dangerous by covering it;¹ and a machinist who, in the line of his duty, undertakes to repair dangerous machinery, takes the risk of being injured while making the repairs.² And the rule is the same although the plaintiff is an infant, if he have sufficient intelligence to appreciate the risk of the work.³ Laborers engaged in making excavations, the dangerous character of the

¹ *Ladd v. New Bedford R. R.*, 119 Mass. 412; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261; *Foley v. Pettie Machine Works*, 149 Mass. 294. Where the plaintiff, the driver of a fire engine, was injured while engaged in driving the engine to a fire by reason of a defect in a street, it was held that the defect was not within the class of risks which the plaintiff assumed when he entered into the employ of the fire department. *Coots v. Detroit*, 75 Mich. 628; *Palmer v. Portsmouth*, 43 N. H. 265. This is upon the ground that the relation of master and servant does not subsist between a city and a member of its fire department. It is also said, in New Hampshire, that the principle applied in the case of servants of railway companies who have sustained injuries in the course of their employment does not seem applicable to the case of injuries sustained from defects in highways, since the liability in the latter case is statutory, and no exception as to any class of persons appears, in favor of the municipality. *Palmer v. Portsmouth*, *supra*. So it is held that a policeman does not, by the nature of his employment, assume risks incident to defective sidewalks and highways. *Galveston v. Hemmis*, 73 Tex. 558. Where the injury to the plaintiff was the result of the weak construction of a scaffold, it was held that if the weakness was caused by the defendant's following the advice or suggestion of the plaintiff (a carpenter) in the building of the scaffold, the plaintiff could not recover. *Blazinski v. Perkins*, 77 Wis. 9.

² *Dartmouth Spinning Co. v. Achard*, 84 Ga. 14. Assuming that if the servant is asked generally to examine a machine and to repair it if he can, the master is not at fault as to the servant by reason of any defect or danger connected with the whole apparatus, yet if the servant is asked only to repair a specific part of the mechanism, it may be the master's duty to warn him of a danger not apparent, and due to the improper working of some part of the apparatus distinct from that which he is asked to repair. *Martineau v. National Blank Book Co.*, 166 Mass. 4.

³ *Gilbert v. Guild*, 144 Mass. 601; §§ 203, 204, *ante*, and cases cited.

labor being open to common observation, assume the risk of injury;¹ and so do workmen engaged in storing ice,² or in demolishing buildings.³ If it is the normal condition of a floor in a manufactory to be greasy and slippery by reason of oil dripping from the machinery, the risk of injury from this condition is one which an employee, working upon the floor, assumes.⁴ It is held that an employer is not bound to give notice that a trap door in a passage-way in his mill used by his workmen is open, out of working hours, to a workman who knows of the existence of the trap door, and that it is likely to be open at any time,⁵ but if the workman is ignorant of the existence of such a door it seems that he does not assume the risk.⁶ An employee assumes the risk of injury by wild animals, as elks and deer, kept by his employer, when he engages to work inside the enclosure in which they are kept.⁷ One working in a trench which he knows, or ought to know, to be dangerous, assumes the risk of injury.⁸ An employee on a steamer assumes the ordinary risks involved in making dangerous landings.⁹ The rule is often applied in the case of injuries occurring to the employees of railway corporation.¹⁰

¹ *McKinzie v. Philadelphia*, 8 Pa. Co. Rep. 293 (1890); *Vincennes Water Supply Co. v. White*, 124 Ind. 376; *Griffin v. Ohio & M. R. R.*, 24 N. E. Rep. 888 (Ind. 1890); *Larsson v. McClure*, 95 Wis. 533. But see *Doyle v. Baird*, 6 N. Y. Sup. N. E. Rep. 517, as cited, § 206, *post*. A foreman in charge of men and teams of his employers, used in making an excavation, who has seen one of the horses alleged to be vicious and unruly, on the work for a week or more, takes the risk of injury by the horse, it being his business to know the character of the horses used in the work, and to send away such as are not fit for use. *Smith v. Drake*, 125 Penn. St. 501.

² *Thorn v. New York City Ice Co.*, 46 Hun, 497.

³ *Carey v. Sellers*, 41 La. Ann. 500.

⁴ *Tinkham v. Sawyer*, 153 Mass. 266; *Murphy v. American Rubber Co.*, 159 Mass. 266, and see *Kleinst v. Kunhardt*, 160 Mass. 230.

⁵ *Young v. Miller*, 167 Mass. 224.

⁶ *Hogarth v. Pocasset Manuf'g Co.*, 167 Mass. 225.

⁷ *Bormann v. Milwaukee*, 93 Wis. 522.

⁸ *Showalter v. Fairbanks Co.*, 88 Wis. 376.

⁹ *Red River Line v. Cheatham*, 23 U. S. App. 19.

¹⁰ The travelling auditor of a railway company, whose duty it is to travel on the company's cars from station to station on its roads, and to audit accounts, is a servant of the company and assumes the ordinary risks

Thus, it is held generally that trackmen or section hands assume the risk of being run down by trains,¹ and it is said that this is so even although such trains be carelessly run in the dark.² So one employed to make up trains in a railroad yard assumes the ordinary risks of that employment; but not the risk of injury from cars sent into the yard at an excessive and manifestly dangerous rate of speed.³ A switchman assumes the risk of unblocked frogs in switches.⁴ The rule is applied even if the proximate cause of the injury be such an accident as is not expected often to occur, but which is fairly to be anticipated as possible. Thus it has been held that injury from the breaking of a rail is a risk to be assumed by a trainman, such breaking not being the fault of the defendant railroad,⁵ and so as to an injury caused by the throwing of an

incident to his employment. *Minty v. Union Pacific R. R.*, 21 Pac. Rep. 660 (Idaho, 1889).

¹ *Larson v. St. Paul, M. & M. R. R.*, 43 Minn. 423; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; *Coombs v. Fitchburg R. R.*, 156 Mass. 220; *Sullivan v. Fitchburg R. R.*, 161 Mass. 125; *Hinz v. Chic., B. & N. R. R.*, 93 Wis. 16; *Schaible v. Lake Shore & M. S. R. R.*, 97 Mich. 318; *Kennedy v. Pennsylvania R. R.*, 24 W. N. C. 371; *McGrath v. New York & New England R. R.*, 15 R. I. 95. Where the known rule of a railroad company requires all trains to approach stations with great care, as expecting to find another train occupying the main track, the engineer assumes the risk of his occupation, and is not entitled to notice that a train in front of him is four hours late. *Illinois Central R. R. v. Neer*, 26 Ill. App. 356. In Pennsylvania, the act of April 4, 1868 (P. L. 58), provided that in the case of injury to any person, not an employee of the company, rightfully employed about the roads, works, depots, and premises of a railroad company, the right of action against the company shall be such only as would exist if such person were an employee. Under this act it was held that the company was bound to exercise towards a teamster employed by a shipper in hauling freight for shipping, only that degree of care which it owes to its employees, although, at the time of the injury, the teamster was on the highway and crossing the tracks of the company, which it was necessary that he should do in carrying out his employment. *Baltimore & Ohio R. R. v. Colvin*, 118 Penn. St. 230.

² *Williams v. Delaware, L. & W. R. R.*, 2 N. Y. S. Rep. 438 (1888).

³ *Caron v. Boston & Albany R. R.*, 164 Mass. 523. See § 207, *post*.

⁴ *Illinois Central R. R. v. Campbell*, 170 Ill. 163.

⁵ *Pittsburg & W. R. R. v. McCombs*, 18 Atl. Rep. 613 (Penn. 1889); *Devlin v. Wabash, St. L. & Pac. R. R.*, 87 Mo. 545; but compare *Clapp v. Minneapolis & St. L. R. R.*, 36 Minn. 6.

engine from the track by animals getting thereon.¹ So where an employee employed on the road-bed was injured by being struck on the head by a stick of timber projecting from a passing car, the car having been improperly loaded, it was held that this fell within the class of accidents which the workman ought to anticipate;² and so where the accident was caused by the defendant's negligent failure to use "check-reins" on its gravel cars, the plaintiff knowing that these were not in use.³ A brakeman assumes risk of coupling and uncoupling cars at cattle guards when these exist at intervals all along the road.⁴ But where an accident was caused to a brakeman by the fact that he was engaged in coupling two cars of different gauges, there being special danger in coupling such cars, it was held that the plaintiff did not assume the risk of the injury.⁵ As to the obligations of railroad corporations in the construction of overhead bridges, the weight of authority seems to favor the application of the general rule; that is, the employee takes the risk of injury by coming in contact with such bridges, if he knows that they are so low as to be dangerous.⁶ The employee takes the risk of injury from

¹ *Mansden v. Eddy*, 3 Tex. Civ. App. 148.

² *Boyle v. New York & New England R. R.*, 151 Mass. 102; and see *Lothrop v. Fitchburg R. R.*, 150 Mass. 423. So as to injuries caused by the accidental dropping of iron rails, handled in a careful and usual manner. *International & G. N. R. R. v. Tarver*, 73 Tex. 308. So, by what would seem an extreme application of the rule, where an engineer was injured by collision with a post which the railroad without his knowledge had a few days before set as a support to an overhead bridge, and within two feet from the position occupied by the engineer. *Thain v. Old Colony R. R.*, 161 Mass. 353, and see *Austin v. Boston & Maine R. R.*, 164 Mass. 282; *Penn. Co. v. La Rue*, 53 U. S. App. 20.

³ *Carr v. North River Construction Co.*, 48 Hun, 266.

⁴ *Fuller v. Lake Shore & M. S. R. R.*, 108 Mich. 690.

⁵ *Gottlieb v. New York, L. E. & W. R. R.*, 100 N. Y. 462. See also *Fay v. Minn. & St. L. R. R.*, 30 Minn. 231.

⁶ *Gibson v. Erie R. R.*, 63 N. Y. 449; *Baylor v. Delaware, Lackawanna & W. R. R.*, 40 N. J. L. 23; *Pittsburg & C. R. R. v. Sentmeyer*, 92 Penn. St. 276; *Baltimore & Ohio R. R. v. Strickler*, 51 Md. 47; *Devitt v. Pacific R. R.*, 50 Mo. 302; *Clark v. Richmond & Danville R. R.*, 78 Va. 709; *Gusman v. Caffery Cent. Refinery*, 49 La. Ann. 1264. But see *Cleveland, C. C. & St. L. R. R. v. Walter*, 147 Ill. 60. In *Gibson v. Erie R. R.*, *supra*, the plaintiff's intestate was killed by coming in contact

the incompetence of his fellow-employee, if he knows such incompetence and still continues in his employment.¹

§ 206. **Employee does not assume Risk of Injury from Hidden Defects.**— It often becomes a question whether the danger, exposure to which results in the injury to the employee, was concealed or apparent; for if it be concealed, the employee cannot be negligent in respect of it; nor can he assume a risk unwittingly.² It is the duty of the master to see that

with the projecting roof of a depot-building, he knowing that it would not admit of his standing upon the roof of the car without coming in contact with it. See the case as cited § 208, *post*, and also *Carbine v. Bennington & Rutland R. R.*, 61 Vt. 348, as cited § 209, *post*. It has however been held in Indiana, see *Baltimore & C. R. R. v. Rowan*, 104 Ind. 88, that accidents arising from collision with bridges built too low for safety should form an exception to the general rule, since such bridges are so dangerous as to make it probable that employees, even when in the exercise of reasonable care, will be injured by coming in contact with them. To the same effect, see *Louisville, N. A. & C. R. R. v. Wright*, 115 Ind. 378. But in a later case in the same State it is held that if a railway employee knows that a bridge on the line of the road is defective and unsafe, and continues to expose himself to the danger on the defendant's trains, he assumes the risk of injury. *Louisville, N. A. & C. R. R. v. Sandford*, 117 Ind. 265.

¹ *Kroy v. Chicago, R. I. & Pac. R. R.*, 32 Iowa, 357; *Mad River & L. E. R. R. v. Barber*, 5 Ohio St. 562; *Brodeur v. Border City Mills*, 16 R. I. 448; *Smith v. Sibley Manuf'g Co.*, 11 S. E. Rep. 616 (Ga. 1890); *Southern Pacific R. R. v. Burke*, 13 U. S. App. 100; *Texas & Pacific R. R. v. Minnick*, 13 U. S. App. 520; *Texas & Pacific R. R. v. Rogers*, 13 U. S. App. 547; *Union Pacific R. R. v. Novak*, 15 U. S. App. 400; *Louisville & Nashville R. R. v. Kelly*, 24 U. S. App. 103. Where the negligence of the fellow-servant consisted in directing the plaintiff to drill out a hole containing an unexploded cartridge it was held that the risk of injury in doing this was one of the risks assumed by the plaintiff in the scope of his employment, and that the master was not liable therefor, at common law. *Kenny v. Shaw*, 133 Mass. 501. But in a later case, brought under the Employers' Liability Act of 1887, a contrary rule was held. *Malcolm v. Fuller*, 152 Mass. 160.

² *Murtaugh v. New York Central & H. R. R. R.*, 49 Hun, 456; *Carpenter v. Mexican National R. R.*, 39 Fed. Rep. 315; *Bohn Manuf'g Co. v. Erickson*, 12 U. S. App. 260; *Bannon v. Lutz*, 158 Penn. St. 166; *Goldie v. Werner*, 151 Ill. 551; *Richlands Iron Co. v. Elkins*, 90 Va. 249; *Burton v. Missouri Pacific R. R.*, 32 Mo. App. 455; *Louisville, N. A. & C. R. R. v. Buck*, 116 Ind. 566; *Columbia & P. S. R. R. v. Hawthorne*,

the employee is not induced to work, supposing the machinery with which or the place in which the work is to be done is safe, when in fact it is not safe.¹ In these cases the question is in reality whether the employee was negligent, and so will be left to the jury as a question of fact, when the testimony is conflicting, or the conclusions to be drawn from it are doubtful.² In determining whether the employee ought to have ascertained the existence of the danger, ordinary rules are to be applied, and the employee will be held only to that degree of foresight which ordinary men might be expected to use in like circumstances,³ and he has a right to assume that the means and appliances furnished him for doing his work are safe.⁴ Nor is he bound to use the utmost conceivable prudence when called upon to act suddenly, in a dangerous emergency.⁵ Thus, it appeared that a defect in a brake, by which an injury to the defendant's brakeman was caused, could easily be seen by looking at it or attempting to handle it; but it did not appear that the brakeman had ever seen it before the time of the accident, and it did appear that he had only two or three minutes in which to determine whether to use it, during which time he was uncoupling cars, regulating their movement, &c. The brake could safely be used with moderation, but under strong pressure was dangerous. It was held that the question whether the brakeman knew of the defect, and used the brake notwithstanding, was for the

3 Wash. Terr. 353; *Anderson v. Minnesota & N. W. R. R.*, 39 Minn. 523; *Magee v. Northern Pacific R. R.*, 78 Cal. 430; *Gisson v. Schwabacher*, 99 Cal. 419; *Lee v. South Pac. R. R.*, 101 Cal. 118; *Pilling v. Narragansett Machine Co.*, 19 R. I. 666.

¹ *Paterson v. Wallace*, 1 Macq. 748. See *Martineau v. National Bank Book Co.*, 166 Mass. 4.

² *Huddleston v. Lowell Machine Shop*, 106 Mass. 286; *Lynch v. Allen*, 160 Mass. 249; *Gibson v. Sullivan*, 164 Mass. 557; *Seymour v. Maddox*, 16 Q. B. 326.

³ See § 150, *ante*.

⁴ *Eastman v. Curtis*, 67 Vt. 432; *Monmouth Mining Co. v. Erling*, 148 Ill. 521; *Carter v. Oliver Oil Co.*, 34 S. C. 215; *Lasure v. Manufg Co.*, 18 S. C. 281; *Evans v. Chamberlain*, 40 S. C. 104; *Tex. & Pacific R. R. v. Hohn*, 1 Tex. Civ. App. 36; *Fort Worth & D. City R. R. v. Wilson*, 3 Tex. Civ. App. 583.

⁵ See §§ 142, 150, *ante*, and cases cited.

jury.¹ The workman is not bound to know more of the nature and character of his surroundings than ordinary workmen of like grade in his situation may fairly be supposed to know; and where the plaintiff's knowledge of the dangerous character of the work, and his means of acquiring such knowledge, are not equal to those of the defendant, who personally superintends the work, the rule that the plaintiff assumes the risk of the employment does not apply.²

§ 207. **As to Defects which the Employee has an Opportunity to detect.** — The authorities are not agreed upon the question whether the employee assumes, absolutely, the risk of injury from apparent defects in machinery or appliances which are caused by the negligence of the master; but it is believed that the weight of modern authority is in favor of the rule that such injuries are not to be included in the ordinary risks of the employment, and that this rule is justified by sound reason. It is to be considered that the contract between the master and the employee is reciprocal, the obligation on the part of the master being to furnish suitable and safe means for doing the work; and this obligation, independent of any contract, rests as well on the duty, which every member of the community is under, not to expose to unnecessary danger another who comes upon his premises by his procurement to transact business with or for him.³ And it has been held, in well-considered cases, that this duty of the master is absolute and not to be avoided by delegation.⁴ On his part, the ser-

¹ *Philadelphia & Reading R. R. v. Huber*, 24 W. N. C. 554, and see *Baltimore & Potomac R. R. v. Mackey*, 157 U. S. 72.

² *Koosorowska v. Glasser*, 8 N. Y. Sup. N. E. Rep. 197 (1890). It is held that an ordinary laborer is not to be supposed to know that the banks of a ditch are in danger of caving in, the question being one of engineering. *Doyle v. Baird*, 6 N. Y. Sup. N. E. Rep. 517 (1889). But see *Songstad v. Burlington, C. R. & N. R. R.*, 5 Dak. 517, and cases cited in § 205, *ante*. Laborers employed to work underground do not assume the risk of the safety of the machinery by which a bucket in which they are carried to their work is lowered, when the defects in such machinery are not obvious, and when it is operated by another employee. *Myers v. Hudson Iron Co.*, 150 Mass. 125.

³ See §§ 3, 5, 11, *ante*, notes and cases cited.

⁴ See § 193, *ante*, notes and cases cited. Thus it is said that the rule

vant agrees to assume the ordinary risks attending the doing of the work which he is hired to do. It would seem to be unreasonable to say that the employee, on his part, contracts to take the risks of injury caused by the breach of the reciprocal contract on the part of the master; or that injuries caused by defects in the means furnished to the servant to do his work are, in any just sense, incidental to the employment, since the law justifies the servant in assuming that proper and sufficient appliances will be furnished him.¹ It is apprehended, therefore, although there is much confusion in the expression of the rules on this subject in some of the cases, that the view of the law is to be accepted which holds that the whole question in such cases is whether or not the employee has been guilty of contributory negligence in continuing in his employment after he has discovered the existence of the defect.² Thus it is said: "The risk of the safety of machinery

of the master's exemption from liability for the negligence of a fellow-servant proceeds upon the theory that the plaintiff, in entering upon the service, is presumed to take upon himself the risks incident thereto. "But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful act of the person placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service." Per Davis, J., in *Union Pacific R. R. v. Fort*, 17 Wall. 553, 559.

¹ See *Ford v. Fitchburg R. R.*, 110 Mass. 240, as cited *infra*: *Rummel v. Dilworth*, 131 Penn. St. 500, 519; *Ryan v. Fowler*, 24 N. Y. 410, 415, where contrary expressions in *Seymour v. Maddox*, 16 Q. B. 326, are criticised; § 203. *ante*, and cases cited. It would seem that dangers arising from such causes, by the negligence of the employer, may well fall under the class of extraordinary dangers. See § 203. *ante*. "Whenever the employer fails in his duty "to exercise ordinary care so that the servant shall not be exposed to danger, "it is negligence, and he is liable to the servant who has been injured in consequence of such failure of duty, and who is without fault on his part; for the servant in assuming the ordinary risks of the employment does not assume a risk which is the consequence of the employer's negligence." *Rhoades v. Varney*, 91 Maine, 222. See *Mahew v. Sullivan Mining Co.*, 76 Maine, 100; *Buzzell v. Laconia Manuf'g Co.*, 48 Maine, 113; *Shanny v. Androscoggin Mill Co.*, 66 Maine, 420.

² *Lee v. Smart*, 45 Neb. 318; *Benham v. Taylor*, 66 Mo. App. 308;

is not assumed by an employee unless he knows the danger, or unless it is so obvious that he will be assumed to know it;"¹ and, again: "The servant undertakes the risks of the employment so far as these spring from defects incident to the service, but he does not take the risks of the negligence of the master."² Where it appeared that the defect which caused the injury was the want of a step on a freight car on which the plaintiff was employed, which defect the plaintiff was aware of, it was held that the case should have been submitted to the jury upon the issue of the plaintiff's contributory negligence, since the question was whether the plaintiff, by recklessly exposing himself to peril, failed to exercise the care for his personal safety which ought to be expected of him under the circumstances. Harlan, J., said: "It is undoubtedly the law that an employee is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger. . . . But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position,—indeed, to all the circumstances of the particular occasion." Thus the rule, as laid down in this case, would seem to be that in all cases the only governing test of responsibility is to be found in the question whether or not the employee was guilty of contributory negligence in continuing in his employment after he had discovered the existence of the defect.³ So, where it was con-

Parker v. S. C. & Geo. R. R., 48 S. C. 364; *Henion v. N. Y., N. H. & H. R. R.*, 51 U. S. App. 157.

¹ *Myers v. Hudson Iron Co.*, 150 Mass. 125, approved in *Washington & Georgetown R. R. v. Gladmon*, 135 U. S. 554, 573.

² *Union Pacific R. R. v. O'Brien*, 161 U. S. 451.

³ *Kane v. Northern Central R. R.*, 128 U. S. 91. See *Texas & Pacific R. R. v. Archibald*, 170 U. S. 665; *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202.

ceded that the defendant was reckless in the manner of running its trains, and that the plaintiff knew it, and the plaintiff had been injured by reason of such recklessness, it was held that there was nothing in the case to justify the court in refusing to submit to the jury the question whether the plaintiff was guilty of contributory negligence.¹ In an earlier case, often referred to, in Massachusetts, the plaintiff was a locomotive engineer, and the cause of the injury was a defect in the boiler of the locomotive upon which the plaintiff was employed, and the plaintiff had full knowledge of the defect, but continued in the employment. It was held that the defendant railroad was answerable for the injury, the defect being due to the negligence of its agents charged with the duty of seeing that its locomotives were kept in proper order; and Colt, J., said, "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect."² And in a later case in the same State it was held that the fact that a brakeman in the employ of a railroad knew of the existence of a defect in the car on which he was employed, which defect caused the injury, was not decisive against his right of recovery in an action for his injury; the ground of the decision being that the fact of knowledge was not conclusive of the plaintiff's negligence.³ The rule to

¹ Jones v. East Tennessee, V. & G. R. R., 128 U. S. 443.

² Ford v. Fitchburg R. R., 110 Mass. 240.

³ Lawless v. Connecticut River R. R., 136 Mass. 1. But compare expressions by Gray, C. J., in Holden v. Fitchburg R. R., 129 Mass. 268, which would seem to qualify the rule stated in the above cases, and see Wood v. Locke, 147 Mass. 604, as cited § 208, *post*. In Randall v. Baltimore & Ohio R. R., 109 U. S. 478, it was held that the employee of a railroad company assumes the risk of the condition of things in the company's yard. In Moulton v. Gage, 138 Mass. 390, it was held that a workman employed upon an "ice-run," which was rendered dangerous

be deduced from the authorities would, then, seem to be that when the proximate cause of the injury is some danger or defect in the means and appliances furnished for doing the work, the existence of which defect or danger is due to the negligence of the master, the plaintiff may still recover, unless it is apparent that, in continuing in the employment under the circumstances, he was guilty of contributory negligence; in other words the employee assumes the risk only of such dangers as, without the fault of the master, ordinarily and naturally attend the employment.¹

§ 208. **Illustrations of the Principle stated.** — The principle upon which the rule stated rests has been recognized, indirectly, in many decided cases. Thus it was held, that a miner, before he could be held to have taken the risk of injury from the existence of defects in the construction of the mine in which he was employed, must have had a reasonable opportunity to become acquainted with the danger;² and later in the same State it was held that where an accident occurred to a railway employee by reason of the defendant's negligence in maintaining a defective track, the defendant could not escape the consequence of its negligence on the ground that the plaintiff had assumed all risks of injury from riding over the track.³ So it is held that an employee, a railway brakeman,

by the want of a railing, whereby he suffered injury, could not recover therefor; and so where the plaintiff fell into a vat of acid which was not protected by a railing. *Carrigan v. Washburn & Moen Manuf'g Co.*, 170 Mass. 79. These decisions in these cases apparently go upon the ground that the plaintiff assumed the risks of his employment, under the circumstances, and exclude the question whether he was or was not guilty of contributory negligence. See cases cited, § 208, *post*.

¹ To the general proposition that the employee does not assume the risk of his employer's failure of duty, see *Promer v. Milwaukee*, L. S. W. R. R., 90 Wis. 215; *Craig v. Chicago & Alton R. R.*, 54 Mo. App. 523; *Libby v. Scherman*, 146 Ill. 540; *Southern Pacific Co. v. Lafferty*, 57 Fed. Rep. 536, 6 C. C. A. 474; *Texas & Pacific R. R. v. Minnick*, 57 Fed. Rep. 362, 6 C. C. A. 387; *Texas & Pacific R. R. v. Rogers*, 57 Fed. Rep. 378; 6 C. C. A. 403; *Southern Pacific Co. v. Johnson*, 44 U. S. App. 1; *Dehn-ing v. Detroit Bridge & Iron Works*, 46 Neb. 556; *Chicago, R. I. & Pacific R. R. v. McCarty*, 49 Neb. 475, and cases cited, § 208, *post*.

² *Craball v. Wapello*, 68 Iowa, 751.

³ *Meloy v. Chicago & Northwestern R. R.*, 77 Iowa, 743.

is not bound to know the unsafe condition of the track unless this is plainly observable;¹ and that although appliances be defective or dangerous, yet if the apprehension of danger from the use of them is not such as would occur to a reasonable man, the rule of risk does not apply to an employee injured by such use, although he may know the existence of the defect.² It is held that the risk of injury from contact with an improperly constructed "tell-tale" is not one which a brakeman assumes as incidental to his employment;³ and so as to a telegraph pole maintained by the company with such a slant inward as to render it dangerous to the company's employees in the discharge of their duty.⁴ So it was considered that the driver of a hose-cart, connected with the fire department, does not assume the risk arising from the insecurity of the streets resulting from the negligence of the municipality.⁵ The rule adopted in each of these cases would seem to exclude the rule that the employee, by his implied contract, assumes absolutely the risk of all injuries arising from defects in machinery or appliances, whether these be latent or patent. It has also been held that when the danger was such as ought not to have attended the plaintiff's employment, the burden of proving that the employee assumed the risk of danger is upon the defendant.⁶ In the application of the rule, it may often be dif-

¹ *Pennsylvania R. R. v. Zink*, 128 Penn. St. 288.

² *Thorpe v. Missouri Pacific R. R.*, 89 Mo. 650; *Fish v. Illinois Cent. R. R.*, 96 Iowa, 702.

³ *Darling v. New York, P. & B. R. R.*, 17 R. I. 708.

⁴ *Whipple v. N. Y., N. H. & H. R. R.*, 19 R. I. 587, and see *Crandall v. N. Y., N. H. & H. R. R.*, 19 R. I. 594.

⁵ *Farley v. New York*, 152 N. Y. 222.

⁶ *Nadau v. White River Lumber Co.*, 76 Wis. 120; *Myhan v. Louisiana Electric Light & Power Co.*, 41 La. Ann. 964; *Swoboda v. Ward*, 40 Mich. 420; *Dorsey v. Phillips, &c., Const. Co.*, 42 Wis. 583; *Rummel v. Dilworth*, 111 Pa. St. 343. This is in accordance with the view held in certain States that contributory negligence is in all cases a matter of defence to be proved affirmatively by the defendant. The court in Wisconsin says: "The employee is only presumed to assume the dangers usually attendant upon his employment; and where he shows that he has been injured by a cause or danger not usually or reasonably attendant upon his employment, he is then entitled to recover, unless it be shown that he knew of such unusual and unreasonable danger, and fully com-

ficult to determine whether the condition of things which produces the injury was the result of negligence of the employer in failing to provide suitable means and appliances, or whether it was the natural and usual condition attending the doing of work of that particular kind, in which latter case the risk would be one of those assumed by the employee. Thus it has been held that a person who enters into the employ of a railway corporation with full knowledge that the corporation has made no provision for protecting its servants from injury from moving trains or locomotives, assumes all the risk of such injuries ;¹ and, on the other hand, that the risks of the employment of a railway operative do not include those arising from the failure of the corporation to use safety frogs and blocks upon the tracks of the corporation, these being a reasonable means of preventing accidents to employees.² It is to be observed that, in certain cases, in which it clearly appeared that the plaintiff was guilty of contributory negligence, and so

prehended its nature, at the time of his employment or before the accident happened. The evidence . . . having established the fact that the injury to the plaintiff was caused by a danger, which ought not to have attended his employment, and would not have attended it if the defendant had performed his whole duty towards him, there is no presumption that the plaintiff assumed the unusual risk, and the burden of proof is on the defendant to show affirmatively that he did, to the extent that it is on the defendant to show any other contributory negligence on the part of the plaintiff." *Nadau v. White River Lumber Co.*, 76 Wis. 120, 131.

¹ *Haskin v. New York Central & H. R. R. R.*, 65 Barb. 129.

² *Seley v. Southern Pacific R. R.*, 23 Pac. Rep. 751 (Utah, 1890), but see *Davis v. St. Louis, Iron Mt. & S. R. R.*, 13 S. W. Rep. 801 (Ark. 1890) ; *Paine v. Eastern R. R.*, 91 Wis. 340. It is held, in Massachusetts, that if a railroad brakeman enters upon the employment of coupling cars upon tracks known to him to be unlocked and dangerous, he takes upon himself the risks of such employment. *Wood v. Locke*, 147 Mass. 604. But it is held in the same State that he does not assume the risk of injury by collision with permanent structures outside of and so near the track as to render the discharge of his ordinary duty dangerous, he being in fact ignorant of the danger, and not having been informed of or instructed in regard to it. *Scanlon v. Boston & Albany Railroad*, 147 Mass. 484. So where a switchman enters upon his employment in a railroad yard which he knows to be intersected by a system of open ditches intersecting the tracks, he assumes the risk of injury by falling into such ditches while engaged in the discharge of his duties. *De Forest v. Jewett*, 88 N. Y. 264. See § 207, *ante*.

ought not to recover, the finding for the defendant has been put upon the ground that the plaintiff by continuing in the employment in the face of the danger assumed, absolutely, the risk of injury. Thus in a case in New York, apparently in opposition to the rule as elsewhere expressed in that State,¹ where the injured employee had, for two or three weeks before the accident, used a hand-car one of the handles to the walking beam of which was broken; the employees inserting the handle of a pick, or a crow bar, in the place of the broken handle, this being done without the direction of the section boss, and the accident to the plaintiff was caused by his working the hand-car in this manner; it was held that, by riding on the hand-car with a knowledge of the defect, and aiding in thus working the hand-car, the plaintiff assumed all risks of injury from such an accident as, in fact, occurred.² There is

¹ See *Laning v. New York Central R. R.*, 49 N. Y. 521.

² *Powers v. New York, L. E. & W. R. R.*, 98 N. Y. 274. The court distinguishes the case of *Laning v. New York Central R. R.*, *supra*, but it is apprehended that the plaintiff might well have been held debarred from a recovery upon the ground of his contributory negligence. See *East Tenn., Va. & Ga. R. R. v. Smith*, 9 Lea, 685, in which case upon similar facts it was held that the plaintiff was debarred from a recovery upon what is apprehended to be the true ground, that he had been guilty of a want of due care in using the car under the circumstances. So, in *Gibson v. Erie Railway*, 63 N. Y. 449, the plaintiff's intestate, a freight conductor, while on the top of a car on his train, was struck and killed by the projecting roof of a depot building. He had long been familiar with the place, having passed it daily in the discharge of his duty. It was held, Miller, J., dissenting, that he assumed the risk of injury by coming into contact with the roof when he entered the employment. It was further held, as, at the time of the accident, it was not necessary to the discharge of his duty that the deceased should be upon the top of the car, that he was, as a matter of law, guilty of contributory negligence in going there. Upon this ground Folger, J., concurred with the opinion of the majority of the court, and it would seem that this finding was sufficient to decide the case. It would seem that to say that the employee who is guilty of contributory negligence assumes the risk of injury is merely to apply the ordinary rule that the plaintiff guilty of contributory negligence is not entitled to recover; and the rule apparently established by the cases already cited is (1) that the plaintiff does not of necessity assume the risk of injury from defects in the appliances furnished him to do his work though these be apparent; (2) that if his negligence in working with such appliances is clearly obvious he will be debarred from a re-

a class of cases in which the employee must, of necessity, assume the risk of injury from defects existing in the machinery or means of doing the work in which he is employed; as where such work in itself consists in handling defective machinery. Thus where a railroad corporation was in the habit of constantly taking damaged cars from one station to another for repair, and a person was employed to couple and switch such cars, and, while engaged in doing this, he was injured by reason of a defect in such a car, it was held that he must be presumed to have undertaken the employment subject to all the peculiar risks attending it, including that of being injured by reason of defects in cars.¹

§ 209. **Contrary Authority.**—The rule, however, seems to have been early settled, by a line of leading cases, in England, that the servant, when he enters upon his employment, assumes the risk of injury, not only from the dangers which of necessity attend the employment, when carefully conducted, but from dangers which arise from defects in appliances which it is the duty of the master to remedy, so long as such defects are open to discovery upon inspection.² This rule is held although it is admitted that the question whether the servant in taking the risk is guilty of negligence, must often be in

covery, not on the ground that he assumed an absolute risk, but on the ground of his contributory negligence; and (3) that where the question whether he was guilty of contributory negligence in so working is in doubt, it is to be submitted to the jury like any other question of fact.

¹ *Chicago & Northwestern R. R. v. Ward*, 61 Ill. 131, and see *Swift v. Rutowski*, 167 Ill. 156.

² *Priestley v. Fowler*, 3 M. & W. 1; *Williams v. Clough*, 3 H. & N. 258; *Griffiths v. Gidlow*, 3 H. & N. 648; *Paterson v. Wallace*, 1 Macq. 748; *Seymour v. Maddox*, 16 Q. B. 326, 20 L. J. Q. B. 327; *Dynen v. Leach*, 26 L. J. N. S. Exch. 221, and see cases cited, § 204, *ante*. As to expressions apparently contrary to the general rule on this subject, as laid down by the English courts, contained in *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130, it is observed that in this case the defendant was under special obligation by the provisions of the "Factory Act," to do what it had failed to do; that the risk was a concealed risk; and further, that the case is hardly to be reconciled with the decisions of the same court in *Dynen v. Leach*, 26 L. J. N. S. Ex. 221; *Assop v. Yates*, 2 H. & N. 768; *Griffiths v. Gidlow*, 3 H. & N. 648. Per Gray, J., in *Ladd v. New Bedford R. R.*, 119 Mass. 412, 414.

reality a question of fact; it being said that "a servant knowing the facts may be wholly ignorant of the risks;"¹ and although it is said that "a servant who continues to work where he is exposed to a danger which he understands and appreciates, and which results from his employer's negligence, and which he did not assume by his implied contract when he entered the service, does not, as matter of law, voluntarily assume it by merely remaining in a place which is rendered unsafe by his master's fault."² The rule, as laid down in the earlier cases, would seem to rest upon the assumption that the implied contract on the part of the servant is that he will assume the risk of the dangers resulting from the breach of the reciprocal contract on the part of the master.³ The English rule, as it is stated above, has been followed, substantially, in many American cases. In Connecticut, it is said: "An employee having knowledge cannot claim indemnity except under peculiar circumstances. He is not secretly or involuntarily exposed, and likewise is paid for the exact position and hazard he assumes."⁴ In Vermont, it is held that a servant who

¹ Per Byles, J., in *Clarke v. Holmes*, 7 H. & N. 937.

² *Smith v. Baker* (1891), A. C. 325. The specific point decided in this case was that when the danger arises from an operation in another department of the business from that in which the plaintiff is engaged, and over which he has no control, the mere fact that he understands the danger is not conclusive to show that he assumes the risk; and the question whether he does assume it is one of fact; Lord Bramwell dissenting. The case would thus seem to establish a certain limitation of the general rule as heretofore held in England.

³ See § 208, *ante*.

⁴ *Hayden v. Smithville Manuf'g Co.*, 29 Conn. 548, 558 (1861). In *Mad River & Lake Erie R. R. v. Barber*, 5 Ohio St., 541, it was held that a railroad employee took the risk of injury arising from the fact that the employer did not furnish a sufficient number of operatives to do its work safely, but it is apprehended that the finding in this case may rest upon a different principle from that upon which the cases cited *supra* were decided. See also expressions in the case of *Coon v. Utica & Syracuse R. R.*, 6 Barb. 231. The court, in *Hayden v. Smithville Manuf'g Co.*, *supra*, cite, in support of the rule laid down, the cases, *Farwell v. Boston & Worcester R. R.*, 4 Met. 49; *Hayes v. Western R. R.*, 3 Cush. 270; *Albro v. Agawam Canal Co.*, 6 Cush. 75; but each of these cases was decided upon the application of the ordinary rule that the employer is not answerable for the negligence of the fellow-servant of the injured em-

having notice of a defective appliance continues in the employment, thereby ordinarily assumes the increased danger as an incident of the service.¹ In this case the alleged defect was in the construction of an overhead bridge, too low to permit the car on which the plaintiff was standing in the discharge of his duty to pass without injuring him.² The court, assuming that a bridge so constructed was a defect, said: "We do not say that an employee who takes a risk that imperils his safety cannot in any case maintain an action, but we do hold that if he knowingly and deliberately assumes a risk that leads him into immediate danger, he cannot recover for injuries that arise from perils that are obvious and certain." The court therefore would seem, by implication, to limit the application of the rule to cases in which the plaintiff in assuming the risk is clearly guilty of contributory negligence.³ In Michigan, it has been held that a brakeman assumes the risk of injury from an imperfect kind of draw-bar in use on the road on which he is employed, when he has customarily used such bars and knows the dangers attending their use.⁴ And there are cases which hold, generally, that the employee assumes the risk of all dangers of which he is aware, although caused by the master's negligence; and that employee's risk and contributory negligence are distinct and separable defences.⁵

ployee, the master having exercised due care in the selection of such fellow-servant. In *Rogers v. Galveston City R. R.*, 76 Tex. 502, it was held that a street-car driver assumes the risk of injury from a defect in the platform on which he stands, if he has knowledge of its defective condition. In *Wells v. Coe*, 9 Colo. 159, it was considered that an employee who had entire charge of the work in hand and the direction of all the employees engaged in it, with authority to order repairs, must be taken to have the same knowledge of defects in the appliances used in the work as his master, and therefore that he took the risk of injury caused by said defects.

¹ *Carbine v. Bennington & Rutland R. R.*, 61 Vt. 348. See also *Dumas v. Stone*, 65 Vt. 442; *Williamson v. Sheldon Marble Co.*, 66 Vt. 427.

² But see §§ 205, 208, *ante*.

³ See § 208, *ante*.

⁴ *Second v. Chicago & Mich. &c. R. R.*, 107 Mich. 540. See *contra*, *Chicago & Northwestern R. R. v. Gillison*, 173 Ill. 264, and § 207, *ante*.

⁵ See *Crown v. Orr*, 140 N. Y. 450; *Knibley v. Pratt*, 148 N. Y. 372;

§ 210. **Employee assumes Risks of Work done voluntarily outside the Scope of the Employment.**—If an employee voluntarily undertakes to do work outside his own duty, he fully understanding the risks attending it, he acts at his own peril, even although, in the doing of the work, he is not negligent.¹ The reason of this rule is that the doing of such work is not called for by the terms of the contract of employment, and, as to his employer, he stands in the relation of one who enters the employer's premises upon business with the owner, and voluntarily puts himself into a position of danger, he knowing and appreciating the risk. In deciding the question of fact whether the work in the doing of which the employee was injured was within the scope of his employment, or was undertaken by him as a volunteer, it is always to be considered that the scope of duty within which a servant is entitled to protection is to be defined by what he was employed to perform, and what, with the knowledge and approval of his employer, he did perform, rather than by the verbal designation of his position.² If it is not disputed that the employee,

Scott v. Darby Coal Co., 90 Iowa, 689; *Erslew v. N. O. & N. E. R. R.*, 49 La. Ann. 86; *Int. & Great North. R. R. v. Turner*, 3 Tex. Civ. App. 487; *Texas & Pacific R. R. v. Bryant*, 8 Tex. Civ. App. 134.

¹ *Mellor v. Merchants' Manufg Co.*, 150 Mass. 362; *Rummel v. Dilworth*, 131 Penn. St. 509; *Coal Run Coal Co. v. Jones*, 127 Ill. 379; *Richmond & Danville R. R. v. Finley*, 25 U. S. App. 16; *Church v. Chic., M. & St. P. R. R.*, 50 Minn. 218; *Evarts v. St. Paul, M. & M. Railway*, 56 Minn. 141; *Potter v. Faulkner*, 1 B. & S. 800; *Degg v. Midland Railway*, 1 H. & N. 773. The rule ordinarily obtains although the plaintiff be a minor. *Gillen v. Rowley*, 134 Penn. St. 209. It was held that a passer-by who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a "volunteer assistant" so as to exonerate the workman's master from responsibility for an injury resulting to the former from the negligence of the workman in doing the work. *Cleveland v. Spier*, 16 C. B. (N. S.) 399. But a passenger upon a railway train who voluntarily assumes the duties of a trainman, although at the request of the servant of the railroad, takes the risk of resulting injuries. *Atchison, Topeka & S. F. R. R. v. Lindley*, 41 Kan. 714. See *Shea v. Gurney*, 163 Mass. 184.

² *Rummel v. Dilworth*, 131 Penn. St. 509, 521. In this case, the plaintiff was employed as a "drag-down" in an iron mill, but received the injury complained of while performing the duties of a "roller." It was

without the direction or assent of his employer express or implied, voluntarily did that which he was not expected to do, it will be held, as matter of law, that the plaintiff cannot recover.¹ The cases in which the act of the servant in doing the work was in fact voluntary, as being without inducement on the part of the employer, are governed by the principle expressed in the maxim, *volenti non fit injuria*.² But the question becomes more difficult when the work done outside the scope of the employment is done at the request, or by the command and direction, of the lawful superior of the workman. In Massachusetts, it is held that if the employee undertake to do work outside the proper scope of his employment, he perceiving its dangers, he takes the risk, although he be ordered by his superior to do the work, and act under the reasonable fear that he will be discharged if he does not obey the order.³ And the same rule formerly prevailed in England.⁴ Upon this subject it is said: "Morally, to coerce a servant to an employment the risks of which he does not wish to encounter, by threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh; but when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dangerous service; and, if for that reason

held that if in the absence of the "roller" the plaintiff was permitted and expected to do the work of the latter, he was entitled to instruction and protection in the same manner as if he had been employed as a "roller;" and that it was a question of fact whether he was permitted and expected to do the work of a "roller."

¹ *Gillen v. Rowley*, 134 Penn. St. 209. See § 211, *post*, notes and cases cited.

² It is held that the defence arising from the application of the maxim is not affected by the operation of the Employers' Liability Act, 43 & 44 Vict., c. 42. *Thomas v. Quartermaine*, 18 Q. B. D. 685, Lord Esher, M. R., dissenting. See § 230, *post*.

³ *Leary v. Boston & Albany R. R.*, 139 Mass. 580, and see *Davis v. Western R. R.*, 107 Ala. 626.

⁴ *Woodley v. Metropolitan District Railway*, 46 L. J. Ex. 521; *Thomas v. Quartermaine*, 17 Q. B. D. 414; 18 Q. B. D. 685; but see *Thrussell v. Handyside*, 20 Q. B. D. 359, as cited, § 211, *post*.

he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks, and while he may require of the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience.”¹ The rule thus stated may seem to be justified, in those jurisdictions in which it is held that the employee assumes absolutely the risk of injury from patent defects in machines or appliances, upon the ground that, by the command of the master or of his duly authorized agent and the acquiescence of the servant, the original contract of employment is extended to embrace the doing of work outside the scope of the original employment.² But it is now held, as has been stated, in many cases, that the workman's right to recover, he having been injured by reason of the existence of such defect, depends always and solely upon the question whether or not, in entering upon or continuing in the employment, he was guilty of contributory negligence.³ If this view is to be accepted as a correct statement of the law upon the subject, that would appear to be a sound rule which holds that when the extra work is undertaken by the command of the master or his agent, the master becomes liable for the consequences of his own negligence, if this is a contributing cause of the plaintiff's injury,⁴ or, in any case, if the employee has no fair

¹ *Leary v. Boston & Albany R. R.*, *supra*, and see *Russell v. Tillotson*, 140 Mass. 201; *Haley v. Case*, 142 Mass. 316; but see expressions in *Mellor v. Merchants' Manufg Co.*, 150 Mass. 362, 364.

² See § 209, *ante*.

³ See §§ 207, 208, *ante*.

⁴ *Lalor v. Chicago, Burlington & Quincy R. R.*, 52 Ill. 401; *Chicago Drop Forge Co. v. Van Dam*, 149 Ill. 337; *Jones v. Lake Shore & Mich. Southern R. R.*, 49 Mich. 573; *Colorado Electric Co. v. Lubbers*, 11 Col. 505. In the last cited case the plaintiff, a carpenter in the employ of the defendant, was sent by it to remove one of its electric lamps and connect the wires with the circuit, the work not being within the scope of his employment. While he was performing the work, the defendant negligently turned on the electric current, by which the plaintiff was injured, and it was held that he was entitled to recover. So where the plaintiff was a minor, who did not understand the danger of the work outside that for which he had made his contract of employment, which work he was

opportunity to estimate and appreciate the danger which the new work involves; since the master is always liable for injuries resulting from the existence of concealed defects for which he is responsible.¹ In such cases, it is apprehended that the master is liable to the employee for the same reason and to the same extent that the owner of land and buildings is ordinarily liable to one who by his invitation comes upon the premises for the purpose of doing business with or for him.²

§ 211. Same Subject: Rule relaxed in Favor of the Employee.

—The tendency of modern authority is clearly towards the view which holds that the master may be responsible for injuries which the employee receives in doing work outside of

ordered to do, and in the doing it was injured, it was held that his employer was liable for negligently setting him to do such work. *Union Pacific R. R. v. Fort*, 17 Wall. 553. See § 211, *post*, and cases cited.

¹ *Yarmouth v. France*, 19 Q. B. D. 647; *Ferren v. Old Colony R. R.*, 143 Mass. 197; *Mellor v. Merchants' Manuf'g Co.*, 150 Mass. 362, and see cases cited, § 211, *post*.

² See §§ 66, 67, *ante*, notes and cases cited. It has been held that when a servant is asked by his master to do something which forms no part of his employment, and while he is doing that which is in fact a mere good-natured act, he receives an injury which he had no cause to expect, he may entitled to recover for such injury. Thus the plaintiff was a workwoman in the employ of the defendant, a dressmaker. The defendant, as the plaintiff knew, kept a savage dog, which in consequence of its having bitten several persons was kept tied up. At the request of the defendant, the plaintiff went into the kitchen of the defendant's house, when the dog rushed from under the table and bit her. A verdict for the plaintiff was supported, the court saying: "If the plaintiff when she entered her employment knew the character of the dog, and that, in the ordinary course of her employment, she would have to go by the place where it was tied up, it might perhaps be said she took the risk. But here she was asked to do something which was no part of her service. . . . The plaintiff had no reason to suppose the dog would be loose, and this was an extra risk not incidental to the service for which the defendant is responsible." *Mansfield v. Baddeley*, 34 L. T. 696. Upon the facts of this case it would seem that the liability of the defendant might well be made to rest upon her negligent or malicious keeping of a savage animal in such a manner that third persons would be exposed to danger from it; for had the plaintiff entered the kitchen, not by order or permission even, but as a trespasser, it is apprehended that the defendant might have been liable for the resulting injury. See § 71, *ante*.

the employment for which he was hired, when the master has been guilty of negligence which, had the work been that contemplated by the original contract, would have rendered him liable, and when the extra work was undertaken by the employee at the command, or explicit direction, of the master or his agent. It is now held by the English courts that the question, in such cases, whether the employee took the risk, is one of fact;¹ and the court says: "It is difficult to say, where a man is lawfully working subject to the orders of his employers, and to the risk of dismissal if he disobeys, . . . that the maxim *volenti non fit injuria* applies. It is true that he knows of the danger, but he does not wilfully incur it. *Scienti* . . . is not equivalent to *volenti*. It cannot be said, where a man lawfully engages in work, and is in danger of dismissal if he leaves his work, that he wilfully incurs any risk which he may encounter in the course of such work." In the same case it was held that where a plaintiff, aware of the danger, was compelled by the orders of the employer to work where he was working when the accident happened, the maxim *volenti non fit injuria* did not apply, and that he might be entitled to recover.² It is to be observed that it must generally amount to much the same thing whether the case be referred to the jury upon the question whether the plaintiff took the risk, or upon the question whether in doing the work he was guilty of contributory negligence. In a carefully considered case in Michigan, where the extra work was done by the order of the plaintiff's superior workman, these rules were laid down: (1) The only risks which a servant assumes are those which properly belong to his employment. (2) A master is responsible for acts of his servant done within the scope of his business and in furtherance of his interests, but done in excess or even in disobedience of his orders, express or implied, and in employing a servant the master takes the risk of his disobedience; and he is therefore liable for injuries result-

¹ *Yarmouth v. France*, 19 Q. B. D. 647; *Membury v. Great Western Railway*, cited 20 Q. B. D. 360; *Thrussell v. Handyside*, 20 Q. B. D. 359. In the latter case the court distinguishes *Thomas v. Quartermaine*, 17 Q. B. D. 414, 18 Q. B. D. 685, as cited, § 210 *ante*.

² *Thrussell v. Handyside*, *supra*.

ing from such acts not only to outsiders, but to subordinate fellow-employees. So where a laborer on a construction train, on a railroad, was ordered by the person in charge of the train to do the work of an engine-man, he being ignorant of such work, and he obeyed, and in doing the work was injured, it was held that the railroad company might be liable for the injury. Cooley, J., said: "It may be said that in thus yielding obedience [the servant] accepts the risks which accompany it, for the same reasons that he accepts the risks of the employment in which he actually engaged. But the risks the servant assumes are only those which are properly incident to the employment; and he may always require the master to respond for injuries resulting from his personal negligence. . . . Nor do we think it follows that because Smith [the person in charge of the construction train] at the time was exceeding his authority, the company is not responsible for his action. It is in general no excuse to the employer that an injury . . . was caused by disobedience of his orders. . . . He assumes the risks of such disobedience when he puts the servant into his business. . . . In this case Smith had charge of the train and of the men employed with it. In what he did, he was not purposely committing any wrong outside the employment, but his wrong was committed while acting in the very capacity in which he was employed, and had for its manifest purpose not to injure [the plaintiff] but to advance the interests of the railway company. As between the company and any other than a fellow-servant, there could be no question that his act should be deemed the act of the company. . . . But we also think that where the superior servant by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond. It is only where the risks properly pertain to the business, and are incident to it, that the master is excused from responsibility; and a risk of this nature not being one of that kind, the general rule applies, and he must answer for the misconduct of his agent." ¹ So, in Illinois, it was held, where a person in the employment of another, in the performance of a specific line of duty only

¹ Chicago & Northwestern R. R. v. Bayfield, 37 Mich. 205, 211-313.

ordinarily hazardous, is commanded by a fellow-servant, whose directions he is to obey, to do an act in the same general service, but different from the employment for which he was hired and extra-hazardous in its character, and in which the superior servant knew that he was unskilled, and in doing such work the servant is injured by the negligence of another servant employed in the particular line of service in which the work was being done, that the common employer was liable for the injury.¹ In Missouri it was held that when a servant, in the course of his work, assumes a dangerous position, in obedience to orders, and is injured in consequence owing to the master's negligence in supplying a sufficient number of workmen or sufficient appliances, the servant's knowledge of the danger will not constitute contributory negligence, unless the danger was so evident that he ought, under all the circumstances, to have refused to enter into it; and that whether he was negligent is a question of fact for the jury.² A like rule was held where the servant of a railroad jumped from a moving train in obedience to orders.³ In Virginia it is held that an employee, acting in obedience to orders, is not to be considered negligent unless the danger is perfectly obvious.⁴ In Michigan it was held that where a railway employee is injured while in the performance of work to which he was wrongfully assigned, and which he had never agreed to do, he is entitled to recover from the railway company for injuries received in doing the work.⁵ It often may be difficult to determine whether the employee, in fact, acted under such circumstances of stress or coercion as would justify the inference that the

¹ *Lalor v. Chicago, Burlington & Quincy R. R.*, 52 Ill. 401.

² *Fogus v. Chicago & Alton R. R.*, 50 Mo. App. 250.

³ *Ballard v. Chicago, R. I. & Pac. R. R.*, 51 Mo. App. 453.

⁴ *Michael v. Roanoke Machine Works*, 90 Va. 492; *Norfolk & Western R. R. v. Ward*, 90 Va. 687; *Norfolk & Western R. R. v. Ampey*, 93 Va. 108. Where a foreman directed a workman to drill out a blast hole which he supposed to be unloaded, and the plaintiff expressed fear, but obeyed orders, and was injured by the explosion of the hole, when he might by examination have discovered that the hole was loaded, he was held negligent. *Sexton v. Turner*, 89 Va. 341.

⁵ *Jones v. Lake Shore & Michigan Southern R. R.*, 49 Mich. 573, and see cases cited, *infra*.

act was not voluntary. Where the employee was given his option to do the work in the doing of which he was injured, or to "lay off," it was held that he assumed the risk of injury in doing the work;¹ and generally it is held that the mere threat of discharge on the part of the employer, should the employee refuse to do the work, will not relieve the latter from the risks attending the doing of it.² But where a common seaman, on board the defendant's vessel, was required under the alternative of punishment to work machinery which was obviously dangerous, it was held that his exposure to danger was not voluntary, and that he did not assume the risk of injury thereby.³ It was held that, the duties of the conductor of a freight train being somewhat general, one who had been conductor for seven years, and brakeman for several years previously, might, when his train was late, and the brakeman employed on it had made several unsuccessful attempts to couple a car, perform that duty himself without assuming the risk of injury.⁴ Where the plaintiff, a railroad fireman, was requested by his engineer to run the locomotive to a certain place, and in doing this the plaintiff was injured by the negligence of the railway company, and it appeared that there was a rule of the company forbidding the engineer to place his locomotive in charge of another, but that the engineer at the time of making the request was sick, and there was testimony that the rule was not intended to be enforced in such cases, it was held that the plaintiff might recover for his injuries.⁵

§ 212. **Promise by Master to make Appliances Safe, Effect of.** — Where the servant has full and equal knowledge with the

¹ *Prentiss v. Kent Furniture Manuf'g Co.*, 63 Mich. 478. The court, in this case, held that it was not open to the plaintiff to say that his contract of employment did not embrace the class of work which he was ordered to do by the defendant's foreman, and in the doing of which he was injured, thus distinguishing the case from the preceding cases of *Chicago & Northwestern R. R. v. Bayfield*, 37 Mich. 205; *Jones v. Lake Shore & Mich. Southern R. R.*, 49 Mich. 573, as cited, *supra*.

² See cases cited, *supra*.

³ *Eldridge v. Atlas Steamship Co.*, 55 Hun, 309.

⁴ *Seley v. Southern Pacific R. R.*, 23 Pac. Rep. 751 (Utah, 1890).

⁵ *East Line & Red River R. R. v. Scott*, 71 Tex. 703.

master that the machinery or materials used are defective, or that a fellow-servant employed with him is reckless or incompetent, but nevertheless remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not of itself, as matter of law, exonerate the master from liability; but the question of contributory negligence will be for the jury.¹ The rule is in accord with the principle laid down in authorities already cited, that the employee does not as a matter of law assume the absolute risk of injury from defects in appliances existing through the negligence of the master, but that the question in all such cases is whether the employee by continuing in the employment, he knowing the means for doing the work to be defective, is guilty of negligence; which question, in doubtful cases, will be for the jury to determine.² The English and certain American cases, however, hold, as

¹ *Laning v. New York Central R. R.*, 49 N. Y. 521, Allen, J., dissenting. See also *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Weber Wagon Co. v. Kehl*, 139 Ill. 644; *Patterson v. Pittsburg & Connellsville R. R.*, 76 Penn. St. 389; *Greene v. Minneapolis & St. Louis Railway*, 31 Minn. 248; *Homestake Mining Co. v. Fullerton*, 36 U. S. App. 32; *Maitland v. Gilbert Paper Co.*, 97 Wis. 476; *Missouri Pac. R. R. v. Baxter*, 42 Neb. 793; *Harris v. Hewett*, 64 Minn. 54. The rule as thus stated is in conformity with that held by the Supreme Court of the United States. Thus in an action for personal injuries to a brakeman, on a railroad, who fell from a car and was injured by reason of a step being off the car, which step he had discovered to be missing and which car the conductor had promised the plaintiff to drop out of the train if it did not contain perishable goods, it was held that it was not, as matter of law, contributory negligence for the plaintiff to stay on the train under all the circumstances of the case. Harlan, J., said: "An employee upon a railroad train, likely to meet other trains, owes it to the public as well as to his employer not to abandon his post unnecessarily. Besides, the danger arising from the defective car was not so imminent as to subject him to the charge of recklessness in remaining at his post under the conductor's assurance that the car should be removed from the train. . . . if it did not contain perishable freight." *Kane v. Northern Central Railroad*, 128 U. S. 91. See §§ 207, 208, *ante*, notes and cases cited.

² See §§ 193, 207, 208, *ante*, notes and cases cited.

has been stated, to the rule that if the employee knows that the means and appliances furnished him for doing his work are dangerous or unsafe, he, by continuing to use them, assumes the risk of injury thereby, and is debarred from showing that, as matter of fact, he was not guilty of contributory negligence in continuing in the employment.¹ But the authorities are agreed that if such means or appliances are dangerous, and the employee has complained of them, and the master, in answer to such complaints, has promised that they shall be made safe, and the employee, while reasonably expecting the promise to be performed, continues in his employment, and is injured by reason of the dangerous defect, before this is remedied, the promise is a competent fact for a jury to consider in determining whether the employee assumed the risk in the mean time, — which question, under such circumstances, becomes one of fact.² But the mere fact of the promise will not, as matter of law, entitle the employee to recover. And if a reasonable time, within which the repair might have been made, has elapsed, and the master has not fulfilled his promise, there is at least a strong presumption that he takes the risk of injury;³ and so if he remains when the danger is obviously imminent.⁴ It is not necessary in order

¹ See § 209, *ante*, and cases cited.

² *Clarke v. Holmes*, 7 H. & N. 937; *Counsell v. Hall*, 145 Mass. 468; *Greenleaf v. Illinois Central R. R.*, 29 Iowa, 14; *Belair v. Chicago & Northwestern R. R.*, 43 Iowa, 662; *Bogenschutz v. Smith*, 84 Ky. 330; *Southern Kansas Railway v. Crocker*, 41 Kan. 747. The notice is sufficient, however timid and hesitating, if it conveys to the master the idea that the defect exists, and that the employee desires its removal. *Thorpe v. Missouri Pacific R. R.*, 89 Mo. 650. It is said that the servant assumes obvious risks of a simple employment, even although the master has promised to furnish him tools by which the work can be done more conveniently, or even more safely; and that the master is not obliged to furnish tools for a certain kind of work if this can be performed with a reasonable degree of safety without them. *Gowen v. Harley*, 12 U. S. App. 574.

³ *Stephenson v. Duncan*, 73 Wis. 404; *Counsell v. Hall*, 145 Mass. 468; *Illinois Steel Co. v. Mann*, 170 Ill. 200.

⁴ *Cross Lake Logging Co. v. Joyce*, 53 U. S. App. 221; *Bellville Stone Co. v. Mooney*, 60 N. J. L. 324; *Erdman v. Ill. Steel Co.*, 95 Wis. 61; *Chicago Brick Co. v. Sobkowick*, 148 Ill. 573; *Texas & N. O. R. R. v. Bingle*, 9 Tex. Civ. App. 322.

to justify the servant in relying on the promise, that a definite time should be fixed for its fulfilment.¹ If it is made in general terms, the servant may rely on it for a reasonable time; but not when it is made contingent on some future event, such as the finishing of a particular job of work.² If the complaint of the employee is not made on his own account, but in behalf of another, and the assurance of the master is not the moving cause of the employee's continuing in his employment, it seems that such promise has not any effect to modify the general rule of risk in favor of the employee. Upon this subject it is said: "Most, if not all the cases . . . go upon the ground that the servant was led to continue at his employment by the master's promise that the defect complained of should be remedied. In some of them there is a direct request to the servant by the master or his representative to do so. No case, we think, has gone so far as to hold that where the servant does not complain on his own account, and continues in his employment with full knowledge of the risk, he can recover of the master, because the latter, when the defective condition was called to his attention by the servant, gave assurances, which did not induce the servant to remain, that the defect should be remedied."³ The rule stated

¹ *Swift v. Madden*, 165 Ill. 41.

² *Standard Oil Co. v. Helmick*, 148 Ind. 457.

³ Per Morton, J., in *Lewis v. New York & New England R. R.*, 153 Mass. 73. It is held, if the workman makes complaint of the insufficiency of the means furnished him to do his work, as of the absence of the assistants necessary to the safe doing of it, there being others at hand upon whom he might call for aid, that he takes the risk of injury. *Way v. Chicago & Northwestern R. R.*, 76 Iowa, 393, 396, and see *Lumley v. Caswell*, 47 Iowa, 159; *Money v. Lower Vein Coal Co.*, 55 Iowa, 671; *Heath v. Whitebreast Coal Co.*, 65 Iowa, 737. These cases follow the rule that the servant assumes absolutely the risk of injury from apparent defects in machinery and appliances, see §§ 207-209, *ante*. For applications of the general rule in cases in which locomotive engineers have been injured by accidents caused by defects in their locomotives, or the appliances thereto, see *Monaghan v. New York Central & H. R. R.*, 45 Hun, 113; *Norfolk & Western R. R. v. Jackson*, 85 Va. 489; *Yates v. McCullough Iron Co.*, 69 Md. 370; *Stephenson v. Duncan*, 73 Wis. 404; *Gulf, C. & S. F. R. R. v. Williams*, 72 Tex. 159. One who was working on a trestle, for the defendant railroad, on a foggy morning, stepped backward to get

appears to be somewhat artificial as it is held by those courts which extend the application of the doctrine of Employees' Risk to cover cases in which the employee suffers injury from defects in appliances existing by reason of the master's negligence, and would seem to be intended to mitigate the rigor of that doctrine as in favor of the servant. It is said that, after a complaint, and a promise by the master that the defect shall be remedied, it cannot be said that the servant by remaining in the employment engages to run the risk, because his complaint to the master negatives the presumption that he acquiesces in the danger. Thus the servant was employed to oil dangerous machinery which was fenced at the time when he entered the employment but the fencing of which had become broken. He made complaint to the master, and the latter promised that the fencing should be repaired. On faith of this promise, the servant continued to do his work, and, he being injured by reason of the want of fencing, it was held that he might recover.¹ But it is evident that, the defect being patent, the servant, in fact, assumed precisely the same risk before and after the complaint; and that, had the issue been made upon his contributory negligence, the fact of his having made a complaint would only have been material as a circumstance to show that he knew and appreciated the dangers of the employment. The same observation applies to those cases which hold that if the conduct of the master has been such as to induce an expectation on the part of the servant that the defect is to be remedied, he may be taken not to be precluded from a recovery by the presumption that he assumed the risk.²

out of the way of a train, and was killed by another train, on another track. The officers of the defendant road had promised the contractor under whom the deceased person was working that trains should be so run that the men working on the trestle could get out of the way. Although this promise was not known to the deceased person, it was held that the question of his contributory negligence was for the jury. *Interstate C. R. T. R. R. v. Fox*, 41 Kan. 715.

¹ *Holmes v. Clarke*, 31 L. J. Ex. 356.

² See *Holmes v. Worthington*, 2 F. & F. 533; *McGee v. Eglington Iron Co.*, 10 R. (Scot.) 955. The principle as stated by Cooley, *Torts*, 559, and approved by the Supreme Court of the United States, is that "if the

SECTION IV.

OF INJURIES CAUSED BY THE NEGLIGENCE OF THE PLAINTIFF'S
FELLOW-SERVANT.

§ 213. **Generally, Master not liable.**—Among the risks which the employee assumes upon entering his employment is that of injury arising from the negligence of his fellow-servants engaged in the same employment. This rule rests on the consideration that the implied contract of service does not include any obligation on the part of the master to hold the employee harmless from risks which the employer cannot control.¹ This principle was laid down, with great elaboration, by Shaw, C. J., in the leading American case upon the subject. After saying that the doctrine of *respondeat superior* can have no application in cases in which the parties, like

servant having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume all risks." See *Hough v. Texas & Pacific Railway*, 100 U. S. 213.

¹ *Albro v. Agawam Canal Co.*, 6 Cush. 75; *Gilman v. Eastern R. R.*, 10 Allen, 236; *Smith v. Lowell Manuf'g Co.*, 124 Mass. 114; *Kelly v. Boston Lead Co.*, 128 Mass. 456; *Beaulieu v. Portland Co.*, 48 Maine, 291; *Hanley v. Grand Trunk R. R.*, 62 N. H. 274; *Wiger v. Pennsylvania R. R.*, 55 Penn. St. 460; *Duffy v. Oliver*, 131 Penn. St. 203; *Pawling v. Haskins*, 132 Penn. St. 617; *Ford v. Lake Shore & Mich. So. R. R.*, 117 N. Y. 638; *Kenny v. Cunard Steamship Co.*, 55 N. Y. S. C. 558; *McCoy v. Empire Warehouse Co.*, 10 N. Y. Sup. N. E. Rep. 99 (1890); *Collyer v. Pennsylvania R. R.*, 49 N. J. L. 59; *Davis v. Detroit & M. R. R.*, 20 Mich. 105; *Blazinski v. Perkins*, 77 Wis. 9; *Miller v. Ohio & M. R. R.*, 24 Ill. App. 326; *Kivem v. Providence, G. & S. Mining Co.*, 70 Cal. 392; *The Sachem*, 42 Fed. Rep. 66; *Hough v. Texas & Pacific R. R.*, 100 U. S. 213; *Priestly v. Fowler*, 3 M. & W. 1; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 308; *Morgan v. Vale of Neath Railway*, 1 Q. B. 149; *Murphy v. Caralli*, 3 H. & C. 462; *Warburton v. Great Western Railway*, L. R. 2 Ex. 30, and see cases cited under the following paragraphs.

an employer and his employee, are in privity of contract with each other, and that the claim of the employee for indemnity for injuries received by reason of the negligence of his fellow-servant must rest, if it is to be supported, upon an implied contract of indemnity, he continues: "It would be an implied promise arising out of the duty of the master to be responsible to each person employed by him . . . to pay for all damages occasioned by the negligence of every other person employed in the same service. If such a duty were established by law, . . . it would be . . . settled by judicial precedents. But we are of opinion that no such rule has been established. . . . The general rule . . . is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks . . . incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any legal principle which should except the perils arising from the carelessness and recklessness of those who are in the same employment. They are perils incident to the service. . . . To say that the master shall be responsible because the damage is done by his agents is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible in a particular case for their negligence, is not decided by the single fact that they are, for some purposes, his agents." The court, in the same case, says further: "We would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was imputed to the defendant, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties arising out of the relation of master and servant."¹

¹ *Farwell v. Boston & Worcester R. R.*, 4 Met. 49 (1842). This case was followed in *Hutchinson v. York, Newcastle & Berwick Railway*, 19 L. J. Ex. 296, 5 W. H. & G. 343; *Wigmore v. Jay*, 19 L. J. Ex. 300;

§ 214. **Limitations of the Rule.** — The negligence of the fellow-servant for which the law exempts the master from responsibility, is negligence only in respect of the subject of the common employment of the two servants. It is obvious that if one of two servants of a common master wilfully or negligently injure the other engaged in a different employment, the injured servant has been exposed to a risk which, under the implied contract of service, he did not assume; and, in such a case the rule of *respondeat superior* is applied to make

5 W. II. & G. 354; Seymour v. Maddox, 16 Ad. & El. (N. S.) 326 (and see Wilson v. Merry, L. R. 1 Sc. App. 326; Priestley v. Fowler, 3 M. & W. 1); Brown v. Maxwell, 6 Hill, 592; Coon v. Syracuse & Utica R. R., 6 Barb. 321. It is to be observed that, in some of the earlier reported cases upon this subject, the limitation of the rule to cases in which the employer has not been guilty of negligence in the selection or employment of his servants is not clearly expressed; but this limitation is clearly defined in the later cases. It is to be noticed further, that Shaw, C. J., would seem to be disposed to limit the doctrine of Employees' Risk, generally, to cases in which the accident has, in fact, occurred without the precedent negligence of the master causing it, — a rule which would clearly reduce the question of the right of the servant to recover in cases in which it is admitted that he was injured by a cause existing through the master's fault, to an inquiry whether the servant was himself guilty of contributory negligence in entering upon or continuing in the employment, a rule which is believed to be in accordance with reason and which is supported by weighty modern authorities. See §§ 207, 208, *ante*, notes and cases cited. So it is said that the doctrine which exempts the master from liability arising out of the negligence of fellow-servants is based upon the assumption by the servant of the ordinary risks of the employment in which the negligence of fellow-servants is included, but it has no application to risks not contemplated by him before entering on the service. *Burke v. Anderson*, 34 U. S. App. 132. See *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. This rule would exclude the operation of the rule held by many English and American cases that the servant takes the absolute risk, not only of injury arising in the proper exercise of the employment, but of that arising from the existence of patent defects in the appliances furnished by the master for doing the work; see § 209, *ante*, notes and cases cited. It is clear that injury arising from the default of a fellow-servant whom the master has, in the first place, carefully selected cannot be referred to the negligence of the master as to a proximate cause; and, on the other hand, that it may well be so referred if the master has been negligent in the employment or retention of the careless servant. See § 100, *ante*, notes and cases cited.

the master responsible.¹ So when the master assumes the responsibility for the act to be done whereby the injury results, or where the law charges him with it by implication, he may be guilty of negligence, and so responsible for the injurious result, although the act is, in fact, done by the hand of another. Thus if defective appliances for doing work are furnished, the master may be responsible although the fellow-workmen of the injured plaintiff are employed by the master in the preparation of them; as where the plaintiff was injured by the fall of a staging upon which he had been directed to go by his master for the purpose of doing the work which he was hired to do; the master having selected the materials for the staging, and superintended the work generally, although he did not personally supervise it, and the work was done by persons who were afterwards the fellow-workmen of the plaintiff.² And there is a line of later American cases which hold that the master is bound by a duty which he cannot avoid by delegation to furnish sufficient and safe means and appliances to the servant for doing the work, and that if the doing of this is intrusted by the master to a servant, such servant is, *pro hac vice*, the agent of the master and not the fellow-servant of the employee who is to make use of the appliances.³ It is held, however, that if the negligent servant is employed by the master not only to do certain work but to furnish the tools and appliances necessary therefor, and by reason of defects in such tools and appliances a fellow-servant of the person furnishing these is injured, the common employer will not be

¹ See §§ 33 *et seq.*, *ante*, notes and cases cited.

² *Arkeson v. Dennison*, 117 Mass. 407; *Twomey v. Swift*, 163 Mass. 273. But where the master had furnished suitable materials and had committed the work to skilful men, the fellow-servants of the plaintiff, it was held that the employer was not liable for an injury caused to the plaintiff by the fall of the structure. *Kelley v. Norcross*, 121 Mass. 508. See *Colton v. Richards*, 123 Mass. 484; *Rogers v. Ludlow Manuf'g Co.*, 144 Mass. 198.

³ See *Northern Pacific R. R. v. Herbert*, 116 U. S. 650; *Van Dusen v. Letellier*, 78 Mich. 492; *Laning v. New York Central R. R.*, 49 N. Y. 521; *Shanny v. Androscoggin Mills*, 66 Maine, 420; *Rogers v. Ludlow Manuf'g Co.*, 144 Mass. 198; *Ryalls v. Mechanics Mills*, 150 Mass. 188, and other cases cited § 193, *ante*.

liable unless it appear that he was negligent in the selection of his employees. It is said: "Suppose a carpenter and plumber are engaged in the common employment of making repairs, each bringing . . . his own tools, the master would not be liable for an injury to the carpenter caused by a defect in the furnace of the plumber. Two woodmen are employed to cut down trees and they both bring their own axes: it could not be contended, if one is injured by a defect in the axe of the other, that the master would be responsible."¹ But it is apprehended that different rules will apply when the employee acts as an agent of the master in furnishing the tools or appliances; and when he contracts simply to do the work and himself furnish the tools, of which he retains the ownership.²

§ 215. **Negligence of the Master contributing, he is Liable.** — If the negligence of the master is a concurring cause with that of the fellow-servant to produce the injury complained of, the master may be liable therefor,³ for "if the negligence of the master contributed to, it must have been an immediate cause of the accident, and it is no defence that another was likewise guilty of wrong;"⁴ and the master enters into an implied

¹ *Harkins v. Standard Sugar Refinery*, 122 Mass. 400. The court say, further: "The workman takes the risks of the employment he engages in, which include the results of negligence on the part of others engaged in the same service; and, where all furnish their own tools and are engaged in a common employment, the workman takes the risk of the negligence of his fellow-workmen in selecting and caring for his tools, as well as in the use of them."

² See *Johnson v. Spear*, 76 Mich. 139; *Chicago, B. & Q. R. R. v. Clark*, 26 Neb. 645; *Northern Pacific R. R. v. Herbert*, 116 U. S. 650; *Niantic Coal Mining Co. v. Leonard*, 126 Ill. 216; *Chicago & Alton R. R. v. House*, 172 Ill. 601; *Chicago & N. W. R. R. v. Gillison*, 173 Ill. 264; *Ellingson v. Chic. & Alton R. R.*, 60 Mo. App. 679; *Stewart v. Philadelphia, W. & B. R. R.*, 17 Atl. Rep. 639 (Del. 1890); *Richmond & Danville R. R. v. Norment*, 84 Va. 167.

³ *Marshall v. Stewart*, 2 Macq. 20; *Chicago & Northwestern R. R. v. Bayfield*, 37 Mich. 205; *Ryan v. Fowler*, 24 N. Y. 410; *Chicago & Northwestern R. R. v. Sweet*, 45 Ill. 197; *Schooner Norway v. Jansen*, 52 Ill. 373; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Perry v. Marshall*, 25 Ala. 659.

⁴ Per Waite, C. J., in *Grand Trunk Railway of Canada v. Cummings*, 106 U. S. 700. But see *Whittaker v. Delaware & Hudson Canal Co.*, 49 Hun, 400.

contract with his employee to use due and reasonable care to make the employment safe. It is said: "The rule . . . is that the master is not responsible to one servant for the ill consequences of the negligence of a fellow-servant, in the course of the common employment. The reason for this rule is, that, as the master cannot prevent carelessness in his servants, it is reasonable to presume each servant agrees to run the risk of that which he knows in the nature of things to be inevitable. But the servant does not agree to take the chance of any negligence on the part of his employer; and no case has gone so far as to hold that where such negligence contributes to the injury, the servant may not recover. . . . Contributory negligence, to defeat a right of action, must be that of the party injured."¹ And the obligation of the master may be referred as well to the duty which every owner of property is under towards those who come upon his premises, by his invitation or procurement, to transact business with him.² Thus if the master was guilty of negligence in selecting, or retaining in his employment, the fellow-servant of the plaintiff through whose fault the accident happens,³ or if his negligence consists in furnishing unsafe and inadequate means and appliances for doing the work, and thereby the employee is injured, the master is liable.⁴ So where the negligence of the fellow-servant is the cause of the existence of defects in machinery or appliances, by reason of which defects injury results to a fellow-

¹ *Paulmier v. Erie R. R.*, 34 N. J. L. 151, 155. See, also, *Booth v. Boston & Albany R. R.*, 73 N. Y. 38; *Cone v. Delaware & Hudson Canal Co.*, 81 N. Y. 206; *Pantzeur v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368; *Perry v. Lansing*, 17 Hun, 34; *Busch v. Buffalo Creek R. R.*, 29 Hun, 112; *Lofrano v. New York & Mt. Vernon Water Co.*, 55 Hun, 452; *Brodeur v. Valley Falls Co.*, 16 R. I. 448; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204; *Fifield v. Northern R. R.*, 42 N. H. 225; *Crutchfield v. Richmond R. R.*, 78 N. C. 320; *McMahon v. Hanning*, 3 Fed. Rep. 353; *Gray v. Philadelphia & Reading R. R.*, 24 Fed. Rep. 168; *Hunn v. Michigan Central R. R.*, 78 Mich. 513; *Hinckley v. Horazdowsky*, 133 Ill. 359; *Cayzer v. Taylor*, 10 Gray, 274.

² See §§ 3, 5, 11, *ante*.

³ See § 198, *ante*, and cases cited; *Harper v. Indianapolis & St. L. R. R.*, 47 Mo. 567; *Chapman v. Erie Railway*, 55 N. Y. 579.

⁴ See § 192, *ante*, and cases cited; *Le Clair v. St. Paul & Pacific R. R.*, 20 Minn. 9.

servant, the master is liable,¹ for it is his duty to keep such machinery or appliances reasonably safe, and he cannot escape this duty by delegating it to another.² The rule would seem to be that when the negligence of the fellow-servant is the proximate cause of the injury complained of, it is necessary, in order to charge the master, to show that he was negligent in employing the fellow-servant; but when the fault of the fellow-servant is the remote cause, the defect for which he is responsible being the proximate cause of the injury, the master is responsible for the injurious consequences of the existence of the defect. The general rule stated is applicable even when the risks are apparent, if the servant for any good reason, as from his youth, inexperience, or incapacity, known to the master, is incapable of appreciating them.³

§ 216. Rule illustrated in Railway Cases.—Applying the general rule, where the plaintiff in the course of his employment as a locomotive engineer for the defendant was injured by the collision of the train on which he was employed with another train of the defendant, it was held that if the defendant's negligence contributed to cause the injury the defendant was liable therefor notwithstanding the contributing negligence of the plaintiff's fellow-servant.⁴ In accordance with the rule, that the duty of a master to maintain machinery

¹ *Hough v. Texas & Pacific Railway*, 100 U. S. 213; *Ford v. Fitchburg R. R.*, 110 Mass. 240; *Holden v. Fitchburg R. R.*, 129 Mass. 268; *Lawless v. Connecticut River R. R.*, 136 Mass. 1.

² See § 193, *ante*, and also *Flike v. Boston & Albany R. R.*, 53 N. Y. 549; *Booth v. Boston & Albany R. R.*, 73 N. Y. 38; *Fuller v. Jewett*, 80 N. Y. 46.

³ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Grizzle v. Frost*, 3 F. & F. 622; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 300, and see cases cited *supra*.

⁴ *Grand Trunk Railway of Canada v. Cummings*, 106 U. S. 700, and see *Gray v. Philadelphia & Reading R. R.*, 24 Fed. Rep. 168. In the latter case the plaintiff and the negligent fellow-servant were respectively the fireman and engineer upon the defendant's locomotive, and it was sought to apply to the case the exploded doctrine of "identification" laid down in the English case of *Thorogood v. Bryan*, 8 C. B. 115; see §§ 104, 105, *ante*; but the court says that that case is in conflict with the great preponderance of judicial opinion in this country.

and appliances in proper repair for the protection of the employees operating them is a personal duty which cannot be delegated so as to exonerate the master from liability for accidents arising from defects in such machinery which might have been prevented by the exercise of due diligence on his part,¹ it was held, where a locomotive engineer was killed by the explosion of a boiler which had been for some time out of repair, which fact had been reported to the proper officer of the corporation, that the defendant was not exonerated from liability by the fact that it had not been negligent in its employment of a superintendent of repairs, or in omitting to make proper regulations for the operation of the road, or by the fact that the master-mechanic of the road had given directions for the thorough examination and repair of the engine, and that the negligence which, in fact, caused the accident was that of the mechanic directed to make the repairs, even although such mechanic was to be taken to have been the fellow-servant of the person killed.² So it is held, if the superintendent of a railroad has made an order as to the management of a particular train, which order is unreasonable and the enforcement thereof dangerous to an employee who is charged with carrying it out, and who is injured in attempting to carry it out, that the railroad is responsible although the negligence of a fellow-servant of the plaintiff was a contributing cause of the injury.³ It has been held that permission given by a railway company to one of its engineers to allow a fireman to act as engineer, where he deemed the fireman competent, made the company responsible for injuries suffered by the fellow-servant of an incompetent fireman so acting; it being the duty of the company to see that only competent and trustworthy engineers were employed upon its road, which duty it could not avoid by delegating it.⁴ It is negligence for a railroad corporation to start a train without sufficient employees to man it, and if by reason of such negligence an

¹ See §§ 193, 194, *ante*.

² *Fuller v. Jewett*, 80 N. Y. 46, 51, 52. See *Ford v. Fitchburg R. R.*, 110 Mass. 240.

³ *Pittsburg, C. & St. L. Railway v. Henderson*, 37 Ohio St. 551.

⁴ *Harper v. Indianapolis & St. L. R. R.*, 47 Mo. 567.

employee on the train is injured the corporation is liable, although the negligence of another train hand contributed to the injury.¹ In Massachusetts, it was held that if a railroad corporation has suffered a structure, not actually in use for the purposes of its business, to remain for an unreasonable length of time, on land within its control, in such a position by the side of the track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe passage of its trains, the structure is, in law, a nuisance, and the corporation is liable to servants employed upon its passing trains as well as to other persons, for injuries resulting from its own neglect in not removing the structure, or in not guarding against the danger of allowing it to remain in such a place, whether it was originally put there by other servants of the corporation or by strangers, and independently of the question of negligence on the part of those who placed it there.²

¹ *Flike v. Boston & Albany R. R.*, 53 N. Y. 549, 554, 555, and see *Booth v. Boston & Albany R. R.*, 73 N. Y. 32. These cases arose out of the same accident, and the negligence of the plaintiff complained of was in starting a train with two brakemen instead of three. The court below was asked to rule that if three brakemen had been provided to go with the train, and if to start with two was negligence, still if the jury believed that the sub-conductor was instructed to report the absence of any brakeman to the head conductor, and failed to do so, and started the train with but two brakemen, this was the negligence of the conductor, for which the defendant would not be answerable. The refusal to give this ruling was justified upon the ground that, no matter whose immediate negligence it was to start the train without a sufficient number of brakemen, so doing was, in law, the negligence of the defendant for which it was responsible whether to servants or third persons. *Booth v. Boston & Albany R. R.*, 73 N. Y. 38, 42.

² Per Gray, C. J., in *Holden v. Fitchburg R. R.*, 129 Mass. 268. In this case, the court would seem to have intended to modify the rule previously laid down in Massachusetts in the case of *Ford v. Fitchburg R. R.*, 110 Mass. 240, where it was said that "the rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, . . . does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect." And the opinion in *Holden v. Fitchburg R. R.*, apparently ac-

(a) *Who are Fellow-Servants.*

§ 217. **General Rule ; Broad Construction of, in England.** — In determining whether the master is liable for the negligence of one of his servants by which another servant is injured, the question is whether the negligent servant, in doing the act complained of, was acting merely in the general scope of his employment, with the plaintiff as his fellow-servant, or whether the act was done as by one exercising the authority, and standing, *pro hac vice*, in the place of the master. In other words, to charge the master it must appear that the act was done, not by a fellow-servant, but by one standing between the parties in the relation, as it has been called, of a vice-principal.¹ If the act was so done, the rule of *respondeat superior* applies and the master is answerable. It is not the rank of the employee, nor his authority over other employees, but the nature of the duty which he is bound to perform, which determines whether he is a fellow-servant or a vice-principal.² So it is not necessary for the master, in order to avoid liability, to show that the servant receiving the injury and the servant by whose fault it was received were in the same degree and kind of employment, so long as both were, in fact, the servants of a common master and were acting together in carrying out a common object.³ In a case in which it was held that a work-

cepts, as establishing the rule of law upon the subject, the expressions of Lord Cairns in *Wilson v. Merry*, L. R. 1 H. L. Sc. 226, 232, that "what the master is bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has . . . done all that he is bound to do." But it is to be observed that the view of the English court upon this subject, so far as it embodies the doctrine that, as to means and appliances, the duty of the master is at an end so soon as he has furnished these of suitable character, in the first instance, is not accepted by the later cases in Massachusetts. See *Rogers v. Ludlow Manuf'g Co.*, 144 Mass. 198; *Ryalls v. Mechanics' Mills*, 150 Mass. 188, 194, as cited § 193, *ante*.

¹ See §§ 220 *et seq.*, *post*.

² *Lindvall v. Woods*, 41 Minn. 212.

³ *Feltham v. England*, 2 Q. B. 33; *Warner v. Erie R. R.*, 39 N. Y. 468; *Malone v. Hathaway*, 64 N. Y. 5; *Stringham v. Stewart*, 111 N. Y.

man in a factory and the superintendent of it were fellow-servants, it was said: "It cannot affect the principle that the duties of the superintendent may be different, and perhaps may be considered as of a somewhat higher character than those of the plaintiff; inasmuch as they are both the servants of the same master, . . . are engaged in the accomplishment of the same general object, are acting in one common service, and derive their compensation from the same source."¹ The master's exemption from liability rests upon the consideration that the implied contract of service does not extend to indemnify the employee against the negligence of any except the master himself, and the separation of the employment into different departments cannot create a liability not intended by the implied contract.² So, in order to charge the master, it is not sufficient merely to show that the servant whose negligence causes the injury is a sub-manager or foreman of higher grade or greater authority than the plaintiff.³ Thus the fact

188; *Judson v. Olean*, 116 N. Y. 655; *Nugent v. Atlas Steamship Co.*, 51 Hun, 306; *Coyne v. Union Pacific R. R.*, 133 U. S. 370; *Gilman v. Eastern R. R.*, 10 Allen, 233; *Noyes v. Smith*, 28 Vt. 59; *Fifield v. Northern R. R.*, 42 N. H. 225; *Buzzell v. Laconia Manuf'g Co.*, 48 Maine, 113; *Hayden v. Smithville Manuf'g Co.*, 29 Conn. 548, and see cases cited *infra*.

¹ *Albro v. Agawam Canal Co.*, 6 Cush. 75, and see *Doughty v. Penobscot Log Driving Co.*, 76 Maine, 143; *Cassidy v. Maine Central R. R.*, 76 Maine, 488; *Conley v. Portland*, 78 Maine, 217.

² *Farwell v. Boston & Worcester R. R.*, 4 Met. 49.

³ See *Gallagher v. Piper*, 16 C. B. (N. S.) 669; *Howells v. Landore Steel Co.*, 10 Q. B. 62; *Wilson v. Merry*, 1 H. L. 326; *Zeigler v. Day*, 123 Mass. 152; *O'Connor v. Roberts*, 120 Mass. 227; *Summersell v. Fish*, 117 Mass. 312; *Blake v. Maine Central R. R.*, 67 Maine, 60; *Lawley v. Androscoggin R. R.*, 62 Maine, 463; *Hoffnagle v. New York Central & Hudson River R. R.*, 55 N. Y. 608; *McAndrews v. Burris*, 30 N. J. L. 117; *Shauck v. Northern Central R. R.*, 25 Md. 462; *Peterson v. Whitebreast C. & M. Co.*, 5 Iowa, 673; *McLean v. Blue Point Gravel Mining Co.*, 51 Cal. 116; *Chicago & Alton R. R. v. Murphy*, 53 Ill. 336; *Valtez v. O. & M. Railway*, 85 Ill. 500. In *Chicago & Northwestern R. R. v. Moranda*, 93 Ill. 302, it was held that to constitute servants of the same master fellow-servants it is not enough that they were engaged in doing parts of some work or in the promotion of some enterprise carried on by the master, not requiring co-operation, nor bringing the servants together or into such personal relations that they could have exercised an influence one

that one is foreman of a gang of laborers, and as such receives higher compensation than the rest of the gang, does not prevent the relation of fellow-servant from existing as between him and the other laborers. But if the particular act done is one that the law implies a contract duty on the part of the employer to perform, then the person performing it is a vice-principal as to such act, and the common employer may be liable for the injurious consequences of it.¹ And so a foreman may be, as to some acts, a fellow-servant of the other laborers, and, as to others, a vice-principal.² And a master is not responsible to an employee for the negligent act of a competent and proper foreman to whom there has been no delegation of power and control of the business or a branch thereof, but who is charged, simply, with special duties which he performs under the direction of the master, who retains the general control and supervision.³ Thus one who is called a foreman, but is one of a separate gang engaged in the same work as that in which an injured workman is engaged, and who has nothing to do with supplying or controlling the apparatus by which the workman was injured, and who is himself subject to the directions of a general foreman, is a fellow-servant of the injured workman.⁴ It is generally con-

upon the other to induce proper caution in respect of their mutual safety, — but it is essential, in order to constitute the relation, that the servants should actually co-operate, at the time of the injury in the particular business in hand, or that their customary duties should bring them into habitual association, so that proper caution would be likely to result therefrom. And the court disapproves the expression in *Chicago & Alton R. R. v. Murphy*, and *Valtez v. O. & M. Railway*, *supra*, that “when the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be regarded as fellow-servants” within the meaning of the rule. See also *Chicago Dredging & Dock Co. v. McMahon*, 30 Ill. App. 358.

¹ *Sullivan v. New York, N. H. & H. R. R.*, 62 Conn. 209. See *Noyes v. Ward*, 102 Cal. 389; *Nixon v. Selby Smelting Co.*, 102 Cal. 458.

² *Ohio & Miss. R. R. v. Stein*, 140 Ill. 61.

³ *Malone v. Hathway*, 64 N. Y. 5; *Duffy v. Upton*, 113 Mass. 544; *Benson v. Goodwin*, 147 Mass. 237; *Moody v. Hamilton Manuf'g Co.*, 159 Mass. 70.

⁴ *Kenny v. Cunard Steamship Co.*, 55 N. Y. S. C. 558. See, also, *Bergquist v. Minneapolis*, 42 Minn. 471; *Quebec Steamship Co. v. Mer-*

sidered that when the facts are undisputed the question whether the relation of fellow-servant exists is one of law; or, if the facts are controverted, a mixed question of law and fact. What the servant is employed to do is a question of fact; the capacity in which he does it is an inference of law. When there is any question as to the facts these are to be left to the jury, with instructions as to the legal inferences to be drawn from the facts which shall be found.¹ It is apprehended that in these cases, as in others, the burden of proof remains with the plaintiff throughout to show the facts essential to the maintenance of his case.² It is to be observed that

chant, 133 U. S. 375; *Kinney v. Corbin*, 132 Penn. St. 341; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; *Johnson v. Ashland Water Co.*, 77 Wis. 51; *Sayward v. Carlson*, 23 Pac. Rep. 830 (Wash. 1890); *Niantic Coal & Mining Co. v. Leonard*, 25 Ill. App. 95, 126 Ill. 216; *Kligel v. Weisel Co.*, 84 Wis. 148; *Stutz v. Armour*, 84 Wis. 623; *Schroeder v. Flint & P. M. R. R.*, 103 Mich. 213; *O'Brien v. Am. Dredging Co.*, 53 N. J. L. 291; *Gilmore v. Oxford Iron Co.*, 55 N. J. L. 39; *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557; *Cleveland, C. C. & St. L. R. R. v. Brown*, 18 U. S. App. 10; *Central R. R. v. Keegan*, 160 U. S. 259; *The Persian Monarch*, 14 U. S. App. 158.

¹ See *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209; *McGinty v. Athol Reservoir Co.*, 155 Mass. 183. A contrary doctrine, however, appears to have been held in Illinois, see *Chicago & Alton R. R. v. Kelly*, 127 Ill. 637, and the later cases in that State hold that while the definition of the words "fellow-servant" is for the court, as matter of law, the question, in each case, whether the relation exists is always one of fact. *Lake Erie & Western R. R. v. Middleton*, 142 Ill. 550, explaining *Chicago & N. W. R. R. v. Moranda*, 108 Ill. 576; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *Louisville, E. & C. R. R. v. Hawthorn*, 147 Ill. 226; *Spring-side, & C. Co. v. Grogan*, 169 Ill. 50. And a like rule is held in Texas. *Mexican National R. R. v. Finch*, 8 Tex. Civ. App. 409. Under the fellow-servant act of Texas, Laws, 1893, p. 120, employees, in order to be fellow-servants, must be in a common service, in the same department, of the same grade, working together, at the same time and place, and to a common purpose. See *Galveston, H. & San Ant. R. R. v. Crawford*, 9 Tex. Civ. App. 245; *San Ant. & Aransas Pass. R. R. v. Harding*, 11 Tex. Civ. App. 497, *Missouri, Kansas, & C. R. R. v. Whitaker*, 11 Tex. Civ. App. 668. This act does not apply to street railways. *Riley v. Galveston City Railway*, 13 Tex. Civ. App. 247.

² See § 111, *ante*. But in *Haley v. Western Transit Co.*, 45 N. W. Rep. 16 (Wis. 1890), it was held that the negligence whereby an employee was injured was to be presumed to be that of the defendant's agent,

the English courts are disposed to give to the ordinary rule which absolves the master from liability for injuries suffered by one servant through the fault of another engaged in the same employment, a broader application than is sanctioned by the later American cases on this subject. In a leading case, Lord Cairns, after laying down the rule that the master is only obliged to select suitable servants in the first instance, and provide suitable appliances for doing the work, being thereafter relieved from any duty of supervision (a doctrine which as to machinery and appliances, at least, is controverted in several well-considered American cases),¹ says: "If the persons . . . selected [as servants] are guilty of negligence, this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the workmen cannot technically be described as fellow-workmen." And so it was held in the same case to be not material that the servant who had been guilty of negligence in setting up a defective scaffolding in a mine, was not actually in the same service at the time when a miner was killed by reason of the defect in the scaffolding. And it was held further that it was not material whether or not the scaffolding had been completed before the person killed entered upon his employment.² And it appears to be held broadly in England that no matter how far superior the rank of the negligent person may be, he is still, for the purpose of fixing liability, to be considered as the fellow-workman of the injured employee.³

rather than that of a fellow-servant. In an action by a servant against his master for personal injuries, sustained in consequence of the negligence of the latter, there is no presumption of negligence from the mere fact of the occurrence of the injury. See §§ 111, 111 *a*, *ante*; *Foss v. Baker*, 62 N. H. 247, criticising *White v. Concord R. R.*, 30 N. H. 188.

¹ See § 193, *ante*.

² *Wilson v. Merry*, L. R. 1 H. L. Sc. 326. See comments upon this case in *Johnson v. Lindsay* (1891), A. C. 371, 386.

³ See *Wilson v. Merry*, *supra*; *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 62, 44 L. J. Q. B. 25; *Leddy v. Gibson*, 11 M. (Scot) 304; *Hall v. Johnson*, 34 L. J. Ex. 222; *Conway v. Belfast, &c. R. R.*, 11 Ir. C. L. R.

§ 218. **As to Subdivisions of Employment: Illustrations of the Rule.** — It is held, generally, that the fact that the employments in which the servants are respectively engaged are different in kind may not, of itself, prevent them from standing as to each other in the relation of fellow-servants; so long as they work under a common superior, and the kind of work performed by each of them, respectively, is designed and immediately directed towards producing a common result.¹ But, while the rule of law governing the cases is simple in its statement, its application to the varying circumstances of different cases has resulted in much apparent diversity in the reported cases. By the application of the general rule, it is held that a mate on a vessel and a common sailor, employed by the same master in a common service, are fellow-servants;²

345; *Feltham v. England*, L. R. 2 Q. B. 33, 36 L. J. Q. B. 14; *Searle v. Lindsay*, 31 L. J. C. P. 106; *Gallagher v. Piper*, 33 L. J. C. P. 329; and apparently *contra*, *Ramsay v. Quinn*, 8 Ir. C. L. R. 322.

¹ *Gulf, C. & S. F. R. R. v. Blohn*, 39 Fed. Rep. 18. See cases cited *supra*; *Chicago & Northwestern R. R. v. Moranda*, 93 Ill. 302, as cited § 217, *ante*; *Cadden v. American Steel Barge Co.*, 88 Wis. 409.

² *Benson v. Goodwin*, 147 Mass. 237; *Olsen v. Clyde*, 32 Hun, 425; *Halverson v. Nisen*, 3 Sawyer, 562; *The Egyptian Monarch*, 36 Fed. Rep. 775; *The City of Alexandria*, 17 Fed. Rep. 390. See also *Malone v. Western Transportation Co.*, 5 Biss. 315; *Thompson v. Herrman*, 47 Wis. 602; *Matthews v. Case*, 61 Wis. 491 (where it is held that the master and mate of a vessel are fellow-servants as being engaged in a common employment); *Loughlin v. State*, 105 N. Y. 159. In the latter case it was held, the plaintiff, an employee of the State, being injured while engaged under the direction of the captain of the "State boat" in digging clay from a bank and landing it on the boat, the captain assisting, that the plaintiff and the captain were fellow-servants. The same rule was held as to the mate and stevedore of a vessel unloading. *Haley v. Western Transit Co.*, 45 N. W. Rep. 16 (Wis. 1890). In *Gabrielson v. Waydell*, 135 N. Y. 1, it was held by a majority of the court that the master and seamen are fellow-servants although of different grades, that for neglect in the line of his duty the master is personally liable; and that his misconduct is a risk assumed by the seamen: so that the owners of the vessel are not liable in damages for the wilful and malicious acts of its master in assaulting and injuring a seaman on the high seas, since such an act, being of a criminal nature, is not in violation of any duty imposed on the owners by maritime law, and the doctrine of *respondet superior* does not apply. But see *The Benefactor*, 28 U. S. App. 424; *The Oregon*, 48 U. S. App. 430. As to the rights of a seaman injured upon a ship on the

and so are the captain of a steam-tug, engaged in hauling a vessel up to a grain-elevator, to be loaded with grain, a workman employed at the elevator to feed grain into the hoppers;¹ or the engineer on a steam vessel and a coal trimmer;² or a superintendent who sets up a derrick and the workman who operates it;³ or two workmen employed in unloading a car, although one of them exercises some degree of supervision over the other;⁴ or a founder in a blast-furnace and an engineer whose business it is to move trains on the furnace tracks, as this may become necessary in the conduct of the business.⁵ By an extreme application of the rule, it has been held that an engineer and conductor on different trains of the

high seas, as against the ship, the following rules are laid down: (1) A claim by a seaman to recover damages for injuries received on board ship, on the high seas, through the negligence of others of the ship's company, is governed by the rules of the maritime law rather than of the municipal law, and the analogies of the latter are not necessarily applicable to the former. (2) The navigation of a ship constitutes one common employment. Neither the vessel nor her owners, therefore, are liable, by the municipal law, for injuries happening to a seaman through the negligence of his associates in the performance of their ordinary duties. (3) By the maritime law, ancient and modern, a seaman, in case of any accident received in the service of the ship, is entitled to medical care, nursing, and attendance, and to cure, as far as cure is possible, at the expense of the ship, and to wages to the end of the voyage, and no more. (4) This right exists without reference to any question of ordinary negligence of himself or his associates, and is neither increased nor diminished by the one or the other. (5) The only qualification of this rule arises from the wilful or gross misconduct of the seaman or his associates, in which case the expense incurred in behalf of the injured seaman may be charged against the wages of the wrong-doer. *The City of Alexandria*, 17 Fed. Rep. 390, and see *Reed v. Canfield*, 1 Sumn. 195; *The Ben Flint*, 1 Abb. (U. S.) 126; *The Neptune*, 1 Pet. Adm. 142; *The Nassau*, 41 U. S. App. 27; *The Louisiana*, 41 U. S. App. 224; *Nevitt v. Clarke*, Olc. 316; *Laws of Oleron*, § 6; *Wisbuy*, § 18; 1 *Malloy*, 351. In *The City of Alexandria*, *supra*, it is said that the cases of *The Chandos*, 4 Fed. Rep. 645; *The Marcella*, 1 Woods, 302; *The D. S. Gage*, 1 Woods, 401; *Thompson v. Hermann*, 47 Wis. 602, are not in conflict with the above rules.

¹ *Baltimore Elevator Co. v. Neal*, 65 Md. 438.

² *Mellen v. Wilson*, 159 Mass. 88.

³ *McGinty v. Athol Reservoir Co.*, 155 Mass. 183.

⁴ *Howard v. Hood*, 155 Mass. 391.

⁵ *Adams v. Iron Cliffs Co.*, 78 Mich. 271.

same road, are fellow-servants;¹ and so a brakeman on a regular train and the conductor of a "wild train," on the same road;² and a day laborer, working as a section boss or foreman on the line of the road, and the conductor and engineer of a train running upon it;³ and the conductor of a freight train and a brakeman who, under the conductor's direction, is assisting in unloading freight;⁴ and a fireman and a train despatcher employed on the same railroad.⁵ It seems to be considered, generally, when the contract between a railway corporation and its employee provides that the former shall transport the latter to and from his place of labor, that the employee and the trainmen of the trains on which he rides are fellow-servants;⁶ and it was held that a railway conductor, conveyed over the road to the place where he was to take charge of his train, was a fellow-servant of the employees of the road who were running the train.⁷ But it is held, and it would seem with good reason, that if the employment for which the servant contracted was completed, and he is, by arrangement or permission, being transported to his home upon one of the defendant's trains, he is not, while being so transported, a fellow-servant of the trainmen.⁸ A section

¹ *Oakes v. Mase*, 165 U. S. 363.

² *Northern Pacific R. R. v. Poirier*, 167 U. S. 48.

³ *Northern Pacific R. R. v. Hambley*, 154 U. S. 349. See *Omaha & R. V. R. R. v. Krayenbuhl*, 48 Neb. 553; *McKenna v. Mo. Pac. R. R.*, 54 Mo. App. 161; *Keown v. St. Louis Railway*, 141 Mo. 36; § 223, *post*.

⁴ *LaPierre v. Chicago & G. T. R. R.*, 99 Mich. 212. See *Wooden v. Western N. Y. & C. R. R.*, 147 N. Y. 508.

⁵ *Millsaps v. Louisville, N. O. & T. R. R.*, 69 Miss. 423.

⁶ *Ross v. New York Central & H. R. R. R.*, 74 N. Y. 617; *McQueen v. Central Branch Union Pacific R. R.*, 30 Kan. 689; *Tunnay v. Midland R. R.*, 1 C. P. 291.

⁷ *Manville v. Cleveland & Toledo R. R.*, 11 Ohio St. 417. See *Doyle v. Fitchburg R. R.*, 162 Mass. 66, as cited § 116, *ante*.

⁸ *Baltimore & Ohio R. R. v. State*, 33 Md. 542; *State v. Western Maryland R. R.*, 63 Md. 433; *O'Donnell v. Allegheny R. R.*, 50 Penn. St. 490 (see *O'Donnell v. Allegheny Valley R. R.*, 59 Penn. St. 239); *Tunnay v. Midland R. R.*, 1 C. P. 291. Where a common laborer on a railroad, while riding gratis on a gravel train to his place of labor, was injured by the negligence of the employees of the railroad in charge of the train, it was held that if, on the one hand, he was by the terms of his contract to be transported to and from his place of labor, then the injury was re-

master and a section hand working under him, both being engaged in the same manual labor, are held to be fellow-servants,¹ and so are locomotive engineers, firemen, and brakemen, employed upon the same train.² Switchmen having charge of the track over which a train runs are held to be the fellow-servants of the trainmen,³ but it was held that a railroad-yard switchman and a locomotive engineer employed by the same corporation were not fellow-servants.⁴ It has been held that a bridge watchman and the conductor and engineer of a train on the road were not fellow-servants, they having different duties and being responsible to different managers,⁵ and for the same reason, that track repairers and train hands are not fellow-servants,⁶ and that a brakeman was not the fellow-servant of a car-inspector.⁷ But it was held that a car-inspector and the conductor of a train which the former was engaged in inspecting when the accident in which

ceived while he was in the service of the railroad; and, on the other hand, if the contract did not include transportation, then such transportation was a permissive privilege granted to the laborer, of which he availed himself to facilitate his service, and which was so connected with it, and with the relation of master and servant, as to bring the case within the general rule. *Gillshannon v. Stony Brook R. R.*, 10 Cush. 228. It was held that a railway employee, going on board a "pay-train" for the sole purpose of receiving his pay, was entitled to the same protection as a passenger. *Louisville & Nashville R. R. v. Stacker*, 86 Tex. 343.

¹ *LaGrove v. Mobile & Ohio R. R.*, 7 So. Rep. 432 (Miss. 1890). But see *Hutson v. Mo. Pacific R. R.*, 50 Mo. App. 300.

² *Gulf, C. & S. F. R. R. v. Farmer*, 73 Tex. 637; *Parrish v. Pensacola, &c. R. R.*, 28 Fla. 251; *So. Florida R. R. v. Weese*, 32 Fla. 212; *So. Florida R. R. v. Price*, 32 Fla. 46.

³ *Farwell v. Boston & Worcester R. R.*, 4 Met. 55.

⁴ *Louisville & Nashville R. R. v. Sheets*, 13 S. W. Rep. 248 (Ky. 1890).

⁵ *Pike v. Chicago & Alton R. R.*, 41 Fed. Rep. 95.

⁶ *Union Pacific R. R. v. Erickson*, 41 Neb. 2; *Missouri Pac. R. R. v. Bond*, 2 Tex. Civ. App. 104. But a car-repairer and yard switchman were held to be fellow-servants, *Smith v. Chic., M., St. P. R. R.*, 91 Wis. 503; and so a car-repairer and car-inspector. *Fordyce v. Briney*, 58 Ark. 206. It is held that a car-repairer employed in the railway shops is not the fellow-servant of a brakeman at work on the road. *Missouri Pacific R. R. v. Dwyer*, 36 Kan. 58.

⁷ *Daniels v. Union Pacific R. R.*, 23 Pac. Rep. 762 (Utah, 1890); *Cincinnati, H. & D. R. R. v. McMullen*, 117 Ind. 439. See § 223, *post*.

the conductor was injured occurred, the conductor knowing of the inspection, were fellow-servants.¹ A telegraph operator who is charged with the duty of signalling trains and directing the order in which these are to proceed from several tracks to a single main track, according to a system of rules provided for his direction by the common superior, has been held

¹ *Whitmore v. Boston & Maine R. R.*, 150 Mass. 477. In *Warburton v. Great Western Railway, L. R.* 2 Exch. 30, it was held that a railway porter employed at a station and an engineer in charge of a locomotive running regularly on the line were not fellow-servants. It is to be observed that the earlier Massachusetts cases appear to apply the general rule very broadly in favor of the master, in railway cases, considering apparently, that all persons who are engaged in furthering in any way the general object for which a railroad is operated; that is, the conveyance of freight and passengers, are, as being so engaged, fellow-servants, no matter how dissimilar or divergent may be their respective lines of duty. Thus in *Gillshannon v. Stony Brook R. R.*, 10 Cush. 228, and *Gilman v. Eastern Railroad*, 14 Gray, 466, it is held that a carpenter engaged in repairing structures on the line of a railroad is a fellow-servant of the trainman on a train on which he travels to his work; but see, apparently *contra*, *Hobson v. New Mexico & Arizona R. R.*, 11 Pac. Rep. 545 (Ariz. 1890). So it has been held, in Massachusetts, that a brakeman employed on a railroad and persons engaged in widening the track are fellow-servants. *Holden v. Fitchburg R. R.*, 129 Mass. 268; and see *Gilman v. Eastern R. R.*, 10 Allen, 233; *Dodge v. Boston & Albany R. R.*, 155 Mass. 448. See also *Elliot v. Chicago, Milwaukee & St. P. R. R.*, 5 Dak. 523; *St. Louis, A. & T. R. R. v. Welch*, 72 Tex. 298. But it is held elsewhere that trackmen are not fellow-servants of those in charge of trains, *Howard v. Delaware & Hudson Canal Co.*, 40 Fed. Rep. 195; *Sullivan v. Missouri Pacific R. R.*, 97 Mo. 113; *Fagundes v. Central Pacific R. R.*, 79 Cal. 97, unless such workman had themselves undertaken some duty in the management of the train. *Casey v. Louisville & Nashville R. R.*, 84 Ky. 79. So it is held that a contractor to furnish coal in receptacles provided for that purpose along the line of the road is not the fellow-servant of a trainman on its trains. *Union Pacific R. R. v. Billeter*, 44 N. E. Rep. 483 (Neb. 1890). But it was considered that persons constructing switches on the road were fellow-servants of an apprentice in the railroad shops, acting as foreman. *King v. Boston & Worcester R. R.*, 9 Cush. 112. In Illinois, it has been held that the question whether the injured person, a section-hand engaged in loading iron on a car, was, at the time of the accident, a fellow-servant with those in charge of the train which injured him, and on which he had ridden to his work, was one of fact for the jury, and that a finding that they were not fellow-servants was warranted by the evidence. *Chicago & Alton R. R. v. Kelly*, 127 Ill. 637.

to be a fellow-servant of the train employees and engineer of one of the trains subject to such directions.¹ So the employee of a railroad whose duty it is to watch for and signal trains is ordinarily the fellow-servant of the trainmen on such trains.² A yard-inspector and a yard-master of a railroad, whose respective duties are different in kind, but complementary to each other, and who are subject to a common superior, are fellow-servants,³ and so are a brakeman and one whose duty it is to fill the sand-box on the locomotive.⁴ It has been held broadly that a servant who sustains an injury from the negligence of a superior agent acting as boss or foreman of a gang of laborers of whom such servant is one, cannot maintain an action against the common employer for injuries sustained through the negligence of such foreman, although the plaintiff was subject to the control of the foreman, and could not guard against his negligence.⁵ But it is apprehended that this is not the rule when the negligence of the foreman was in re-

¹ *Monaghan v. New York Central & H. R. R.*, 45 Hun, 113; *McCaig v. Northern Pacific R. R.*, 42 Fed. Rep. 383; *Baltimore & Ohio R. v. Campbell*, 31 U. S. App. 213; *Oregon Short Line v. Frost*, 44 U. S. App. 606. But it was held that a telegraph operator was not the fellow-servant of a brakeman who was injured by a defect in a bridge, through the negligence of the operator in not reporting the defect to the superintendent. *Gulf, C. & S. F. R. R. v. Blohn*, 39 Fed. Rep. 18. A station agent and telegraph operator were held to be fellow-servants of the conductor of a train. *Dealey v. Philadelphia, &c. R. R.*, 3 Cent. Rep. 112.

² *Murray v. St. Louis, C. & W. R. R.*, 98 Mo. 573; *Cincinnati, N. O. & T. P. R. R. v. Clark*, 57 Fed. Rep. 125, 6 C. C. A. 281.

³ *St. Louis, Iron Mt. & Southern R. R. v. Rice*, 51 Ark. 467.

⁴ *Louisville, N. O. & T. R. R. v. Petty*, 67 Miss. 255. It was held that the yard-master of a railroad company who acts temporarily as the engineer of a switching-engine in the defendant's yard, is not, as to the fireman on such engine, a fellow-servant. *Hardy v. Minneapolis & St. L. R.*, 36 Fed. Rep. 657. A brakeman and a car-inspector, jointly charged with the duty of inspecting foreign cars, are fellow-servants. *Dewey v. Detroit, G. H. & M. R. R.*, 97 Mich. 329.

⁵ *Keenan v. New York, L. E. & W. R. R.*, 145 N. Y. 190; *Deavers v. Spencer*, 25 U. S. App. 411; *Balch v. Haas*, 36 U. S. App. 693. See, also, *Minneapolis v. Lundin*, 19 U. S. App. 425; *What Cheer Coal Co. v. Johnson*, 12 U. S. App. 490; *Kansas & A. Valley R. R. v. Waters*, 36 U. S. App. 31; *Sherman v. Rochester & S. R. R.*, 17 N. Y. 153; *Laughlin v. State*, 105 N. Y. 159.

spect of some duty which it was the duty of the common employer to see performed, and the performance of which he had delegated to the foreman.¹

§ 219. **Servants working under Contracts with Different Employers.**— Although two persons are engaged in a common employment, or an employment directed to the same object, yet if they are employed by different masters they are not fellow-servants in such a sense as to relieve the master of one of them of responsibility for injuries occasioned by the fault of the other; for the implied contract of indemnity in favor of the master only exists as to the negligence of his own servants.² Thus where the plaintiff was injured while employed upon a barge in lightering a steamship, by one of the hands engaged upon the steamship in discharging her cargo, the barge and steamship being owned by different persons by whom, respectively, the two workmen were employed, it was held that the plaintiff and the negligent servant of the owners of the steamship were not fellow-servants.³ If one railway company, by arrangement, runs its trains over the track of another, the servants of either are not the fellow-servants of those of the other.⁴ And it is not material whether a contract exists between the two carriers for the joint purpose of conveying passengers or goods, whatever effect the existence of such a privity might have upon the liability of either, or both, to passengers negligently injured in the course of transporta-

¹ See §§ 217, *ante*, 220, 222, *post*, and cases cited.

² *Sullivan v. Tioga R. R.*, 112 N. Y. 643; *Sanford v. Standard Oil Co.*, 118 N. Y. 571; *Nary v. New York, O. & W. R. R.*, 9 N. Y. Sup. N. E. Rep. 153 (1890); *Sawyer v. Rutland & Burlington R. R.*, 27 Vt. 370; *Catawissa R. R. v. Armstrong*, 49 Penn. St. 186; *Zeigler v. Danbury & Norwalk R. R.*, 52 Conn. 543; *Phil., W. & B. R. R. v. State*, 58 Md. 372; *Robertson v. B. & A. R. R.*, 160 Mass. 191; *Morgan v. Smith*, 159 Mass. 570. See *Moynihah v. Hills Co.*, 146 Mass. 586, 594, as cited, § 220, *post*.

³ *Svenson v. Atlantic Mail Steamship Co.*, 57 N. Y. 108.

⁴ See cases cited, *supra*. An employee of a railroad, engaged in delivering a car to another railroad on the tracks of the latter in the regular course of business between the two railroads, is not a mere licensee, and has the rights of one entering the premises of another by invitation. *Turner v. Boston & Maine R. R.*, 158 Mass. 261.

tion;¹ so long as the one carrier has, under the contract, nothing to do with the employment or payment of the servants of the other. So a switch-tender employed by a railroad corporation on a portion of its track upon which it permits another corporation to run trains is not a servant of the latter corporation; and an engineer of the latter corporation, who is injured by the negligence of the switch-tender in performing his duty, may maintain an action against the former corporation which employed the switch-tender.² It was held, where two railway corporations were engaged in carrying passengers and merchandise over separate portions of an entire route of travel, ran their trains so as to connect at a common terminus, and sold tickets over the entire route, but the fares and freights over each portion of the route were kept distinct, that there was no such legal identity between the two corporations as would make an employee of one of them the fellow-servant of the employees of the other.³ It is to be observed that the reason of the rule applies when servants of a common master are employed upon works which are separate, and clearly distinct, one from the other; and in such a case the servants respectively so employed are not fellow-servants of each other.⁴ The rule stated does not exclude the application of the general principle that "When one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the man who lent him."⁵ Or that the

¹ See §§ 46, 47, *ante*, and, also *Nashville & Chattanooga R. R. v. Carroll*, 6 Heisk. 347.

² *Smith v. New York Central & H. R. R. R.*, 19 N. Y. 127, 132.

³ *Carroll v. Minnesota Valley R. R.*, 13 Minn. 30. See also *Phillips v. Chicago, M. & St. P. R. R.*, 46 Wis. 475. It has been held, in Illinois, that where two sets of men employed by a railroad company while working at their respective duties, are of necessity more or less in the way of and crossing the lines of each other, the question where they are or are not fellow-servants is one of fact for the jury. *Chicago & Alton R. R. v. Kelly*, 25 Ill. App. 17; 127 Ill. 637.

⁴ See *Moynihan v. Hills Co.*, 146 Mass. 586, 594, as cited § 221, *post*.

⁵ Per Cockburn, C. J., in *Rourke v. White Moss Colliery*, 2 C. P. D. 205, 209; *Purnell v. Great Western Railway*, 1 Q. B. D. 636; *Hasty v. Sears*, 157 Mass. 123.

servant, by submitting himself to the orders of another than his master, may become, *pro hac vice*, the servant of such other, and so a fellow-servant of the servants of the latter.¹ But, generally, it will be for the defendant to show that such relation of servant existed, as a defence. It is said: "I can well conceive that the general servant of A. might, by working towards a common end along with the servants of B. and submitting himself to the control and orders of B., become *pro hac vice* B.'s servant in such sense as not only to disable him from recovering from B. for injuries sustained through the fault of B.'s proper servants, but to exclude the liability of A. for injury occasioned, by his fault, to B.'s own workmen. In order to produce that result the circumstances must . . . be such as to show conclusively that the servant submitted himself to the control of another person than his proper master and either expressly or impliedly consented to accept that other person as his master, for the purpose of the common employment."²

(b) *Of the Doctrine of Vice-Principal.*

§ 220. **Delegation of Authority : Effect of.** — When a master delegates to a servant duties which belong to himself, the servant will occupy the place of the master, not that of fellow-servant with other employees, and the master will remain responsible for the negligence of the servant to whom his authority is thus delegated, as if he were personally guilty of such negligence.³ For, in such cases, the negligent servant is

¹ Delaware, L. & W. R. R. v. Hardy, 59 N. J. L. 35.

² Per Lord Watson, in *Johnson v. Lindsay* (1891), A. C. 371, and see *Cameron v. Lystrom* (1893), A. C. 308. In the latter case it was held that the servants of a stevedore, engaged in unloading a ship, and of the master of the ship were not fellow-servants.

³ *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204; *Brodeur v. Border City Mills*, 16 R. I. 448; *Chicago, Milwaukee & St. P. R. R. v. Ross*, 112 U. S. 377; *Alaska Co. v. Whelan*, 29 U. S. App. 1; *Wabash & Western R. R. v. Brow*, 31 U. S. App. 192; *Louisville, N. A. & R. R. v. Berkeley*, 136 Ind. 181; *New Pittsburg Coal Co. v. Peterson*, 136 Ind. 398; *Mattise v. Ice Co.*, 46 La. Ann. 1535; *Union Pac. R. R. v. Doyle*, 50 Neb. 556; and see *Pantzeur v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368; *Lofrano v. New York & Mt. Vernon Water Co.*, 55 Hun, 452. §§ 193, 194, *ante*, §§ 221, 222, *post*.

the *alter ego* of the master, to whom the master has left everything, and such servant stands between the parties in the place of vice-principal, and his negligence is the negligence of the master.¹ Thus where the middleman, or superior servant, employs or discharges subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglect of duty of the servant charged with the selection of other servants and the general conduct of the business committed to him.² There are cases in which the master cannot avoid his duty of supervision by delegating it. Thus it is his duty to see that the means for doing the work, and the place in which it is to be performed, are reasonably safe, and he cannot defend an action for injuries caused by a failure in this duty by setting up that it was committed to a servant. And it has already been stated that the later American cases hold that the master's duty is not fulfilled when he has provided suitable appliances in the first instance, but that he is bound to see that such appliances remain in a reasonably safe condition;³ so that when a master is unable to be present to see that buildings and machinery are kept in order, and employs another to do this, such employee is not the fellow-servant of the other employees, but a vice-principal, for whose negligence in this respect the master will be liable.⁴ It is settled that a

¹ *Murphy v. Smith*, 19 C. B. (N. S.) 361.

² *Laning v. New York Central R. R.*, 49 N. Y. 521, as explained in *Malone v. Hathaway*, 64 N. Y. 5, 9. See also *Grizzle v. Frost*, 3 F. & F. 622; *Allen v. New Gas Co.*, 1 Ex. D. 251; *Corcoran v. Holbrook*, 59 N. Y. 517; *Wright v. New York Central R. R.*, 28 Barb. 80; *Munn v. Oriental Print Works*, 11 R. I. 187; *Brabbitts v. Chicago & Northwestern R. R.*, 38 Wis. 289; *Dobbin v. Richmond & Danville R. R.*, 81 N. C. 446; and apparently *contra*, *Galveston, H. & S. F. R. R. v. Smith*, 76 Tex. 611, as cited § 222, *post*.

³ See §§ 193, *ante*, 222, *post*.

⁴ *Van Dusen v. Letellier*, 78 Mich. 492; *Balhoff v. Mich. Cent. R. R.*, 106 Mich. 606; *Anderson v. Mich. Cent. R. R.*, 107 Mich. 59; *Lund v. Hersey Lumber Co.*, 41 Fed. Rep. 202; and see *Rogers v. Ludlow Manuf'g Co.*, 144 Mass. 198; *Northern Pacific R. R. v. Herbert*, 116 U. S. 650; *Shanny v. Androscoggin Mills*, 66 Maine, 420; *Cincinnati, H. & D. R. R. v. McMullen*, 117 Ind. 439, and other cases cited, § 193,

person who is, in some things, a mere servant, may still be the agent of the master to perform other duties which are primarily personal to the master.¹ On the other hand, if a

ante. So it is held where the plaintiff worked under the immediate supervision and control of a superior, representing the master, and was not himself clearly guilty of negligence in obeying the commands of the superior, that the defendant was responsible for the negligent recklessness of his representative in giving orders, in obeying which the plaintiff was injured. *Herriman v. Chicago & Alton R. R.*, 27 Mo. App. 435.

¹ *Moynihan v. Hills Co.*, 146 Mass. 586. In this case, Knowlton, J., after stating the rule that the master's obligation to provide and maintain suitable machinery and appliances for doing the work is a personal duty which he cannot discharge by delegating it, says: "In many kinds of business the condition of a machine as to safety is constantly changing with the use of it, and it is safe or unsafe at a given moment according as it is properly or improperly used and managed by the servant who operates it. Moreover, certain kinds of repairs can be conveniently and properly made, under direction and supervision, by servants regularly employed in the business. In such cases both parties to the contract of service must be presumed to have contemplated that, to a certain extent, fellow-servants would be employed by the master to do work in keeping the machinery safe. Work negligently done within that field, if an accident should happen from it, would seem at first to introduce a conflict between the obligation of the master to hold himself liable for want of due care in keeping his machinery safe, and the obligation of the servant not to claim damages resulting from negligence of a fellow-servant. . . . The application, in each particular case, of any general rules which may be laid down will involve the consideration of two questions of fact: First, what is the nature and character of the business, and the usual and proper general method of conducting it? Secondly, in such a business, what is reasonably necessary to be done on the part of the master to secure for the use of the workmen machinery and appliances which will be reasonably safe? First, there is that class of cases in which the condition of a machine as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, from materials or new parts supplied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employees, negligence of a fellow-servant. So far as the condition of machinery depends upon this kind of attention, the master does his duty if he employs competent and suitable persons, and supplies them with everything needed for their work. A second class of cases includes those in which repair or reconstruction of a machine is necessary, of such a kind as is commonly done, or may properly be done, under the direction

workman charged in some directions with the duty of superintendence, does the negligent act complained of, not as a

of the master by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow-servants of the employee, and he must therefore be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of the work for the results of which, in the completed machine, the master agrees to hold himself responsible, so far as good results can be insured by his exercise of proper care. And so he is bound to bring to this department of the business, either in his own person or by an agent, such intelligence, skill, and experience as is reasonably to be required in one to whom in an important particular the safety of others is intrusted, and he is bound also to be reasonably diligent and careful in the use of his faculties. One who represents him in this field is not acting as a fellow-servant with his other employees, within the meaning of the rule which we are considering, but is his agent or servant, for whose care and diligence he is accountable. There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never reasonably have contemplated that any servants employed in the business would build or reconstruct it. A proprietor might buy such a machine or send an agent or servant to buy it. In either case the purchase would be in the line of the master's duty, and he would be liable for the consequences of negligence in making it. He might hire privileges and men in a machine-shop . . . and build it there. His servants in that work would not be fellow-servants with an employee engaged in an entirely different business. And under the doctrine of *respondeat superior* he would be held for the consequences of their negligence. . . . Upon our hypothesis it would be inconsistent with his implied contract to employ fellow-servants of his employee in this work, and he therefore could not relieve himself from his general obligation as to the safety of his machinery by setting up that his servants in the construction or reconstruction were fellow-servants with his employees in the business in which it was used." See *Pittsburg Traction Co. v. Walker*, 170 Ill. 550. So, although it is considered, in Massachusetts, that a section-master on a railroad is, generally, the fellow-servant of the train-men employed on the road, see cases cited § 218, *ante*, a limitation of this rule is recognized in cases where the duty of supervision has been intrusted to the section-master. *Babcock v. Old Colony R. R.*, 150 Mass. 467. In this case the defendant's section-master, who shared with others the responsibility of supervision at the place where the accident occurred, and who had received printed instructions from the general manager of the railroad to see that "no wood, lumber, ties, or other obstructions are piled within six feet of the track," disobeyed the order, and by reason of his negligence the plaintiff was injured. It was held that it was a question for the jury

superintendent, but in his capacity of fellow-servant of the plaintiff, the master will not be liable for such negligent act,¹ and the mere fact that one employee has authority over others does not make him a vice-principal in a matter which it was not his duty to attend to.²

§ 221. **Vice-Principal : What Constitutes.** — It is apprehended that the person who does the act complained of is a vice-principal when, in doing it, he so represents the master as to make it the act of the master. The general principle governing this subject has been stated as follows: "The duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation, and if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of the principal, and the latter must assume the risk of his negligence. The same is true of the general supervision of his business; if there is negligence in this, the master is responsible for it, whether the supervision be by the master in person or by some manager, superintendent, or foreman, to whom he delegates it. In other words while the servant assumes the risk of the negligence of fellow-servants, he does not assume

whether the defendant had so intrusted the section-master with any part of its duty of supervision as to render itself liable to the plaintiff; and it was held, in substance, that the defendant would be liable if its supervising agents were guilty of negligence while performing the duty of the master; and that the real question was whether the defendant had failed, through its servants and agents intrusted with that duty, to exercise such care and supervision as it ought to have exercised to prevent the occurrence of similar accidents.

¹ *Shaffers v. General Steam Navigation Co.*, 10 Q. B. D. 356; *Osborne v. Jackson*, L. R. 11 Q. B. D. 619; *Kellard v. Rooke*, 19 Q. B. D. 585, 21 Q. B. D. 367; *Cashman v. Chase*, 156 Mass. 342; *Gall v. Beckstein*, 173 Ill. 187. The application of the rule does not exempt from liability a master who himself takes part with the servant in the work to be performed, if by the negligence of the master in doing such work the servant is injured. And his copartners, carrying on with the master the general work, may be jointly liable with him. *Ashworth v. Stanwix*, 3 El. & El. 701; 30 L. J. Q. B. 183. See also *Roberts v. Smith*, 26 L. J. Ex. 319; *Warren v. Wildee*, 41 L. J. C. P. 104 n.; *Osborne v. Jackson*, *supra*.

² *Newbury v. Getchell Co.*, 100 Iowa, 441.

the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority.”¹ So, in New York, it is held, generally, that a railway corporation is liable for the negligence of its officers, in respect of such acts and duties as it is required to perform as master or principal, no matter what the rank or title of such officers may be.² The rule thus expressed is not repugnant to the general rule that those persons are fellow-servants who are employed by the same master to perform the same or co-ordinate duties for the same general purpose; but the general rule has no application when the superior whose negligence causes the injury is clothed with the authority and charged with the duty of the master.³ It is evident that the rule, as laid down by Cooley, J., rests upon the assumption that the duty of the master to provide suitable and safe places, machinery, and appliances for doing the work, is a personal duty which the master cannot avoid by delegating it; a doctrine accepted by the courts of Michigan,⁴ and believed to be supported by the great weight of modern authority in the United States.⁵ But it will be found, that those courts which hold, in accord with an important line of English cases that the master’s duty in respect of appliances is fulfilled when he has, in the first instance, provided such as are suitable,⁶ also hold that the workman’s superior, in superintending and looking out for the safety of machinery and appliances, is merely the fellow-servant of the workman using them; since, in this view of the law, he is not acting as the master’s agent, charged with the performance of a duty which the master cannot avoid, but merely as a workman in co-operation with the in-

¹ Per Cooley, J., in *Quincy Mining Co. v. Kitts*, 42 Mich. 34. See also *Harrison v. Detroit, L. & N. R. R.*, 79 Mich. 409; *Chapman v. Erie R. R.*, 55 N. Y. 579; *Gilmore v. Northern Pacific R. R.*, 18 Fed. Rep. 866; *Calan v. Bull*, 113 Cal. 593.

² *Flike v. Boston & Albany R. R.*, 53 N. Y. 549; and see *Loughlin v. State*, 105 N. Y. 159. .

³ *Hunn v. Michigan Central R. R.*, 78 Mich. 513.

⁴ *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. Detroit, B. C. & A. R. R.*, 81 Mich. 423.

⁵ See § 193, *ante*, notes and cases cited.

⁶ *Wilson v. Merry*, L. R. 1 H. L. Sc. 326.

jured servant. It is to be observed that, in cases in which the injury complained of is the result of the negligence of one representing the master but the act is not done in the conduct of the business for which the plaintiff was employed, the doctrine of *respondeat superior* is applied to make the master liable; and this is so although the business in which the negligent act is done be, in a sense, collateral to that in which the plaintiff is employed, as where the agent of the master is negligent in shipping and setting up machinery necessary for performing the work, such duty being usually and of necessity performed by others than the workmen employed in the regular business.¹

§ 222. **Same Subject: Rule in Supreme Court of the United States.** — While the authorities substantially agree that when the intermediary between the master and his employees represents the delegated authority of the former, he stands in the position of a vice-principal, the attempted application of this principle to the circumstances of different cases has produced some confusion of statement and an apparent contrariety of opinion in the reported decisions, as must always be the case when a court is called upon to decide what is, in effect, a question of fact, before applying to the case a rule of law.² But, as has been stated, the later American authorities supply a criterion of liability, which, it is apprehended, must in most cases be sufficient, in the rule which holds that the master cannot avoid by delegation the duty of furnishing for the use

¹ See *Moynihan v. Hills Co.*, 146 Mass. 586, 594, as cited § 220, *ante*. But it is held in Massachusetts that the master does not owe the servant about to enter his service any duty to inspect all the work which has been done by his servants previously, and which might be intrusted to them without liability to their fellow-servants for their negligence; and that the risk of accident from the previous negligence of servants in their own field is one of the ordinary risks of the employment which the servant assumes by virtue of his contract. *Killea v. Faxon*, 125 Mass. 485; *O'Connor v. Rich*, 164 Mass. 560.

² It is to be observed that there is a line of cases which hold that the question whether one is a vice-principal is for the jury, when the facts, or the conclusions to be drawn from them are doubtful. See *Great Northern R. R. v. McLaughlin*, 44 U. S. App. 189; *Mobile & Ohio R. R. v. Massey*, 152 Ill. 144; *South Florida R. R. v. Weese*, 32 Fla. 46.

of the servant, and maintaining in safe order, the means, machinery, and appliances necessary for doing the work which the servant is hired to do.¹ This being so it is evident that any person to whom the master delegates the duty of superintending or keeping in order such machinery, works, or appliances, represents the master, and so is a vice-principal. Thus where the station-agent of a railway company, acting under general orders to see that the cars of the company were kept safe, negligently permitted a defective and rotten stake to remain upon a platform-car, by reason of which neglect the plaintiff was injured, it was considered that the plaintiff was entitled to recover for his injuries, since the agent represented the company and the latter was responsible.² So it is held that a master is liable for the negligence of his foreman, ordered to remove a barge from the water without direction as to means, in selecting unsafe ropes for that purpose by the breaking of which a laborer is injured; and that the defendant's foreman and superintendent, though present and assisting in removing the barge, are not fellow-servants of a laborer injured by the breaking of a rope in the selection of which the foreman was negligent.³ Upon the ground that the person to whom the master has delegated his duty of seeing that the employee is provided with suitable means with which, and suitable and safe places in which, to perform the service of the master, is a vice-principal, it is held, generally, that a car-inspector appointed to see that the cars on which the employees of the railroad employing him are to work are in good order, is not a fellow-servant of the train-men employed on such cars.⁴ It being negligence for a master to fail to furnish

¹ See §§ 193, 220, 221, *ante*, notes and cases cited.

² *Bushby v. New York, L. E. & Western R. R.*, 107 N. Y. 374. For applications of the rule see, also, *Durkin v. Sharp*, 88 N. Y. 225; *Fay v. Minneapolis & St. L. R. R.*, 30 Minn. 231; *Tierney v. Minn. & St. L. R. R.*, 33 Minn. 311; *Macy v. St. Paul & Duluth R. R.*, 35 Minn. 200; *Carlson v. Northwestern Tel. Co.*, 63 Minn. 428; *Railroad v. Spence*, 93 Tenn. 173; *Railroad v. Kenley*, 92 Tenn. 207; *Brann v. Chicago, Rock Island & Pac. R. R.*, 53 Iowa, 595; *Moynihan v. Hills Co.*, 146 Mass. 586; *Babcock v. Old Colony R. R.*, 150 Mass. 467; *Rogers v. Ludlow Manuf'g Co.*, 144 Mass. 198.

³ *Lund v. Hersey Lumber Co.*, 41 Fed. Rep. 202.

⁴ *Condon v. Missouri Pacific R. R.*, 78 Mo. 567; *Sadowski v. Mich.*

a sufficient number of workmen to do the work safely, the officer of a railroad who negligently starts a train without train-men sufficient safely to manage it, stands, *pro hac vice*, in the place of the railroad, which will be responsible for his actual negligence as for that of a vice-principal.¹ And there is a line of well-considered cases which hold that if the master is negligent in the general supervision of his business he is responsible for the injurious results of such negligence to his servants, whether the supervision be carried on by the master in person, or by some manager or superintendent to whom he delegates it; since the servant, while he assumes the risk of

Lumber Co., 84 Mich. 100; Brann v. Chicago, R. I. & Pacific R. R., 53 Iowa, 595; Bushby v. New York, L. E. & W. R. R., 107 N. Y. 374; Cincinnati, H. & D. R. R. v. McMullen, 117 Ind. 439; Macy v. St. Paul & Duluth Railway, 35 Minn. 200; Fay v. Minneapolis & St. L. R. R., 30 Minn. 231. See, *contra*, Columbus & Xenia R. R. v. Webb, 12 Ohio St. 475; Little Miami R. R. v. Fitzpatrick, 42 Ohio St. 318. In Mackin v. Boston & Albany R. R., 135 Mass. 201, it was held that whatever might be the liability of a railway for the negligence of its car-inspector in the inspection of cars belonging to the corporation, the liability of the corporation to provide suitable cars did not apply as to cars received by it for transportation from another corporation, but that, "as to cars so received, the duty . . . is not that of furnishing suitable instrumentalities but of inspection, and this duty is performed by the employment of . . . competent . . . inspectors, . . . and, however, it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the "train-men," and so to be the fellow-servants of such train-men. The rule thus stated appears to be approved in Keith v. New Haven & Northampton Co., 140 Mass. 175; Smith v. Flint & Pere Marquette R. R., 46 Mich. 258; Cincinnati, H. & D. R. R. v. McMullen, 117 Ind. 439, 445. The opinion in Mackin v. Boston & Albany R. R. appears to rest upon the ground held in the English cases heretofore cited, that the duty of the master is fulfilled when he has in the first instance furnished suitable means for doing the work, a doctrine not accepted by the later cases in Massachusetts. See § 193, *ante*. And in a case similar in its facts to Mackin v. Boston & Albany R. R., it was held competent for the plaintiff to show as a fact that as a matter of habit or custom no inspection of the cars not belonging to the defendant was made, that the safety of the employees required such inspection. Coffee v. New York, N. H. & H. R. R., 155 Mass. 21.

¹ Booth v. Boston & Albany R. R., 73 N. Y. 38; Cumberland & Pennsylvania R. R. v. State, 44 Md. 283; Carpenter v. Mexican National R. R., 39 Fed. Rep. 315. See Byrnes v. New York, L. E. & W. R. R., 113 N. Y. 251.

injuries caused by the negligence of his fellow-servants, does not assume risks from the negligence of the master or of persons to whom the master may delegate his authority.¹ So it was held that a train-despatcher who has absolute control over a division of a railroad, so far as the running of the trains thereon is concerned, is a representative of the corporation and not the fellow-servant of those working under his orders;² and that the owner of a mine is responsible for the negligence of a mining-captain in charge of it, whereby one of the miners suffers injury.³ Where the work done by a fore-

¹ Quincy Mining Co. v. Kitts, 42 Mich. 39; Faeber v. Scott Mining Co., 86 Wis. 226; and see Van Dusen v. Letellier, 78 Mich. 492, as cited § 193, *ante*.

² Hunn v. Michigan Central R. R., 78 Mich. 573; Sheehan v. New York Central & H. R. R. R., 91 N. Y. 332; Smith v. St. L. & Pacific R. R., 92 Mo. 389; Chicago, Burlington & Quincy R. R. v. McLallen, 84 Ill. 109; Chicago, Burlington & Quincy R. R. v. Young, 26 Ill. App. 115; Hankins v. New York, L. E. & W. R. R., 142 N. Y. 416; Darrigan v. New York & New England R. R., 52 Conn. 285.

³ Ryan v. Bagaley, 50 Mich. 179; Mahon v. Ida Mining Co., 95 Wis. 308. Where an employee was injured by the negligence of the "boss and agent" of a mining company, acting as foreman of the gang in which the plaintiff was employed, the court said: "The relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this court . . . that when one servant is placed by the employer in a position of subordination to and subject to the orders and control of another, and such inferior servant without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury." Berea Stone Co. v. Kraft, 31 Ohio St. 287. But in Pennsylvania it is held, uniformly, that a "mining-boss" and the members of the gang working under him are fellow-servants. See Lehigh Valley Coal Co. v. Jones, 86 Penn. St. 432; Delaware & Hudson Canal Co. v. Carroll, 89 Penn. St. 374; Waddell v. Simonson, 112 Penn. St. 567; Reese v. Biddle, 112 Penn. St. 72; Lineoski v. Susquehanna Coal Co., 157 Penn. St. 153 (and it is so held as to the engineer who operates the shaft-elevator; Bradbury v. Keystone Coal Co., 157 Penn. St. 231; Mulhern v. Lehigh Valley Coal Co., 161 Penn. St. 270). It was held otherwise as to a superintendent having authority to hire and discharge men, Beeson v. Green Mountain Mining Co., 57 Cal. 20; and so where the "pit-boss" of a mine had authority to tell the workmen to do certain work or to quit, it was held that he did not stand to them in the relation of fellow-servant. Consolidated Coal Co. v. Wombacher, 134 Ill. 57. And the better rule seems to be that whether the shift-boss in a mine is or is not the fellow-servant of a laborer in the mine

man was in providing suitable appliances, not in moving coal with the rest of the gang of workmen, it was held that as to his work he was a vice-principal.¹ And the defendant's superintendent to whom it had delegated general authority to manage the business, including the duty of seeing that the machinery was kept in good order, was held to be the plaintiff's superior servant in starting a planer which the plaintiff was oiling and thereby injuring the plaintiff.² A foreman in a mill whose duty it is to see that dangerous machinery is kept covered, is not, as to such duty, the fellow-servant of an employee who is injured by reason of the non-performance of it.³ So where the foreman in charge directs a laborer to perform work under circumstances of great danger, the employer cannot escape liability merely on the ground that the negligence of the foreman was the doing an act of manual labor in setting in motion the agency that caused the injury and that thereby the foreman became a fellow-servant of the plaintiff.⁴ It is believed that the authorities already cited establish the principles: 1, that the position of the employee as vice-principal or fellow-servant is not to be determined merely by reference to his nominal rank or position in the general employment; and 2, that if the employee is fully clothed with the delegated authority of the master in respect of a duty towards his fellow-employees which the master is bound to perform, he then stands, as to his fellow-employees, in the relation of vice-principal. But the Supreme Court of the United States, in an elaborately considered case, has laid down the following rules: (1) The mere superiority of the negligent employee in position, and the power to give orders, is not a ground for liability; (2) In order to create liability the person whose neglect caused the injury must have been invested with the control and management of a distinct de-

pends not upon his grade, or his control over the other members of the shift, but upon the character of the acts he is required to perform. *Bunker Hill, &c. Co. v. Schmelling*, 48 U. S. App. 331.

¹ *Jarnek v. Manitowoc Co.*, 97 Wis. 537.

² *Shumway v. Walworth Manuf'g Co.*, 98 Mich. 411.

³ *Roux v. Blodgett, &c. Co.*, 94 Mich. 607.

⁴ *Crystal Ice Co. v. Sherlock*, 37 Neb. 19; *Hammond Co. v. Johnson*, 38 Neb. 244.

partment and not of a mere separate piece of work in one of the branches of service in a department; (3) when the business naturally and necessarily separates itself into departments of service, those placed in charge of the separate departments are, in reference to the employees under them, vice-principals.¹ Upon a strict application of the principles thus stated it was held that where there exists no division of the business of a corporation into departments, only the directors of the corporation, or its general superintendent, intrusted with the entire management of the business, can be considered vice-principals.²

§ 223. **Same Subject: Railway Employees.**— It has been considered that the following classes of persons stand in such relations respectively to the common employer and other employees as to be vice-principals, for whose negligence the common employer may be liable: the master mechanic in a railroad shop, having full authority over the men, machinery, and work, there being no other representative of the corporation present;³ an assistant road-master having charge of one

¹ *Northern Pacific R. R. v. Peterson*, 162 U. S. 346, and see *Northern Pacific R. R. v. Charles*, 162 U. S. 359; *Alaska Mining Co. v. Whelan*, 167 U. S. 86; *Union Pacific R. R. v. Callaghan*, 56 Fed. Rep. 988; 6 C. C. A. 205; *Cleveland, C. C. & St. L. R. R. v. Brown*, 56 Fed. Rep. 804, 6 C. C. A. 142; *Joliet Steel Co. v. Shields*, 146 Ill. 603; *Taylor v. Ga. Marble Co.*, 98 Ga. 512; *Findlay v. Russell Wheel Co.*, 108 Mich. 286; *Musick v. Dold Packing Co.*, 58 Mo. App. 322.

² *What Cheer Coal Co. v. Johnson*, 12 U. S. App. 490. The Supreme Court of the United States having held that the conductor and brakeman on a railroad were, under the circumstances of the case, fellow-servants, *Chicago, M. & St. P. R. R. v. Ross*, 112 U. S. 377, as cited § 223, *post*, it was said that it must be held that there are divisions of the service of a railroad company into departments; that the heads thereof are vice-principals; that a train of cars is such a department; that the conductor of such a train is such a representative of the company so that if by his negligence an employee on the train is injured the company is liable. *Northern Pac. R. R. v. Beaton*, 29 U. S. App. 88 (1894).

³ *Taylor v. Evansville & T. H. R. R.*, 121 Ind. 124. So it is held that a foreman in charge of a distinct piece of work in an extensive foundry, and having under him laborers bound to obey his orders, is, as to them, a vice-principal and not a fellow-servant; and this is so although another may be general foreman of the entire establishment. *Dowling v. Allen*,

hundred and fifty miles of railroad, as to the workmen under him;¹ the foreman of railway shops in charge of a wreck, as to his men engaged, under his orders, in restoring the train;² the superintendent of the construction of a line of railroad, having foremen and workmen under him;³ the general manager of a railroad, as to an engineer employed on the road.⁴ It follows from the application of the principle already stated, that a person may be, as to one class of acts, the fellow-servant of those working with him, and, at the same time, as to acts in which he is charged with a delegated duty of the master, a vice-principal. Thus it was held that the superintendent and manager of a mill who volunteered to do the work of a disabled employee and called another workman to assist him in it became, by so doing, the fellow-servant of the latter workman, and that his orders, in respect of the work, were those of a fellow-servant and not of a vice-principal; but

74 Mo. 13. See also *Gravelle v. Minneapolis & St. L. R. R.*, 10 Fed. Rep. 711; *Gilmore v. Northern Pacific Railway*, 18 Fed. Rep. 866.

¹ *Harrison v. Detroit, L. & N. R. R.*, 79 Mich. 409; and see *Louisville, N. A. & C. R. R. v. Graham*, 124 Ind. 89; *St. Louis & S. F. R. R. v. Weaver*, 35 Kan. 412.

² *Borgman v. Omaha & St. L. R. R.*, 41 Fed. Rep. 667. It was held where a train hand on a railroad was injured while digging gravel through the negligence of one who was at the same time engineer, superintendent, conductor, and master of gravel and material, with power to hire and to discharge hands, that the superior and the plaintiff were not fellow-servants. *Dobbins v. Richmond & Danville R. R.*, 81 N. C. 446, and see *Cowles v. Richmond & Danville R. R.*, 84 N. C. 309; *Chicago, Milwaukee & St. P. R. R. v. Ross*, 112 U. S. 377, and other cases cited, *infra*. But in *Galveston, H. & S. F. R. R. v. Smith*, 76 Tex. 611, it was held that a road-master in charge of a working party was a fellow-servant with one of the men working under him, although he had power to discharge the men.

³ *Denver, S. P. & P. R. R. v. Driscoll*, 12 Col. 520. It was held that an employee working at a monthly salary, who acts as chief manager in charge of the works, without authority to buy new articles or to repair machinery, but who does sometimes make slight repairs without orders, hires and discharges employees, keeps and reports their time to the officers of the company, who frequently inspect the works, and under whose direction he is in all matters, is a fellow-servant of the other employees. *Yates v. McCullough Iron Co.*, 69 Md. 370, and see *Brodeur v. Valley Falls Co.*, 16 R. I. 448.

⁴ *Krogg v. Atlanta & W. P. R. R.*, 77 Ga. 202.

that, in his failure to give the latter workman necessary warnings and instructions as to the dangers attending the work, his negligence was that of a vice-principal, and so that the common employer was liable for the results of such failure.¹ So a railway engineer has been held to be a vice-principal as regards the duty to inspect his engine, since it is the duty of the principal to see that the engine is in a reasonably safe condition for service.² It is held that one employed by a board of public works, with full power to hire and discharge laborers, and direct the prosecution of the work of constructing a street, is a vice-principal in his relation to dirt-shovellers employed under him;³ and that so is the foreman superintending the loading of a ship, with full power to give orders.⁴ It has been held by the Supreme Court of the United States, in a majority opinion, that a railway conductor, having the entire control and management of a railway train, is not a fellow-servant with the firemen, brakemen, porters, and engineer of the train; but that as to them and the train, he stands in the place of, and represents the corporation.⁵ The prin-

¹ *Klochinski v. Shores Lumber Co.*, 93 Wis. 417. See *Railway Co. v. Torrey*, 58 Ark. 217.

² *Atchison, Topeka & Santa Fe R. R. v. Mulligan*, 34 U. S. App. 1.

³ *Hathaway v. Des Moines*, 97 Iowa, 333. See *Bloyd v. Railway Co.*, 58 Ark. 66; *Claybaugh v. Kansas City, &c. R. R.*, 56 Mo. App. 630.

⁴ *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726.

⁵ *Chicago, Milwaukee & St. P. R. R. v. Ross*, 112 U. S. 377, Bradley, Matthews, Gray, and Blatchford, JJ., dissenting. In the brief dissenting opinion, it is said, without discussing authorities, that the rule adopted by the majority tends "to break down the long established rule with regard to the exemption from responsibility of employers for injuries to their servants by the negligence of their fellow-servants." In line with the majority opinion in this case appear to be the cases *Little Miami R. R. v. Stevens*, 20 Ohio, 415; *Cleveland, C. & C. R. R. v. Keary*, 3 Ohio St. 201; *Pittsburg, Fort Wayne & Chicago R. R. v. Devinney*, 17 Ohio St. 197; *Chicago, Burlington & Quincy R. R. v. Blank*, 24 Ill. App. 438; *Louisville & N. R. R. v. Collins*, 2 Duv. 114; *Boatwright v. Eastern R. R.*, 25 S. C. 128; *Coleman v. Wilmington, C. & A. R. R.*, 25 S. C. 446; *Mason v. Richmond & D. R. R.*, 114 N. C. 718; *Norfolk & Western R. R. v. Thomas*, 90 Va. 205; *Clark v. Hughes*, 51 Neb. 780; *Ragsdale v. Northern Pacific R. R.*, 42 Fed. Rep. 383; *Canadian Pacific R. R. v. Johnson*, 26 U. S. App. 85. A contrary rule seems to be implied in *Gilshannon v. Stony Brook R. R.*, 10 Cush. 228; *Holden v. Fitchburg R. R.*, 129 Mass.

ciple recognized in this case is said to be that where a given operation connected with a railway requires care and oversight for the proper performance thereof, and for that purpose there is placed in charge of it one clothed with the duty of supervising and controlling the given work and having control and direction over those employed, such person in carrying out the duty of control, supervision, and management, represents the company.¹ In a later case, it was held that a common day laborer who, while working for the company under the order and direction of a section "boss" or foreman, on a culvert on the line of the railroad, receives an injury by the negligence of the conductor and engineer of a passenger train on the road, is a fellow-servant of such engineer and conductor. The case was distinguished from that of *Chicago, M. & St. P. R. R. v. Ross*, for that, in the latter case, the liability was placed upon the ground that the person who sustained the injury was under the direct authority and control of the person by whose negligence the injury was caused.²

(c) *Remedy as between the Fellow-Servants.*

§ 224. **Negligent Servant liable.**—If a servant receive injuries by reason of the negligence of a fellow-servant, both being engaged in a common employment under the same master, and the negligence being in respect of such employment, the negligent servant is answerable therefor in an

263, and in many of the earlier cases. In *Brown v. Central Pacific R. R.*, 72 Cal. 523, it was held that a conductor and brakeman employed on the same train were fellow-servants; and, in *Miller v. Ohio & M. R. R.*, 24 Ill. App. 326, that a laborer on a construction train was a fellow-servant with the engineer and conductor of the train; and it is held in the same State that a blacksmith and a railway conductor, both engaged, temporarily, as part of the same gang, in clearing a wreck, are fellow-servants. *Abend v. Terre Haute & I. R. R.*, 111 Ill. 202. See also *Chicago & Alton R. R. v. Keefe*, 47 Ill. 108; *Wilson v. Madison, &c. R. R.*, 18 Ind. 220.

¹ *Borgman v. Omaha & St. L. R. R.*, 41 Fed. Rep. 667.

² *Northern Pac. R. R. v. Hambley*, 154 U. S. 349. See *St. Louis, &c. R. R. v. Needham*, 27 U. S. App. 227; *Northern Pac. R. R. v. Mase*, 27 U. S. App. 238; *Baltimore & Ohio R. R. v. Baugh*, 149 U. S. 368; *Oakes v. Mase*, 165 U. S. 363; *Howard v. Denver, &c. R. R.*, 26 Fed. Rep. 837.

action brought by the injured servant.¹ Thus when an employee personally selects the means and directs the method of setting up apparatus furnished by the common employer, he becomes personally responsible to his fellow-employees for injuries caused by his negligence in so doing; but there is no responsibility except when the employee acts as a free agent in doing the work.² The negligence of the defendant in such a case is a breach of the common-law duty which each member of the community owes to every other so to conduct his business and affairs that no other person shall receive a needless injury.³ The right of action does not rest in any contract, whether between the two servants, or between the servants and their common employer, and the action therefore sounds in tort.⁴ And, since there is no privity between fellow-servants, it would seem that the right of action is in no way affected by the legal relations existing between the defendant servant and the common employer. It has been attempted to apply in such cases the rule which makes an agent responsible to third persons for misfeasance only and not for non-feasance.⁵ It is clear, however, that in most cases this rule, if legally applicable, must be useless, since "non-feasance" would be the refusal of the agent to carry

¹ *Wiggett v. Fox*, 11 Exch. 832; *Degg v. Midland Railway*, 1 H. & N. 773; *Swainson v. Northeastern Railway*, 3 Ex. Div. 341; *Wright v. Roxburgh*, 2 Ct. of Sess. Cas. (3d Series) 748; *Hinds v. Harbou*, 58 Ind. 121; *Hinds v. Overacker*, 66 Ind. 547; *Griffiths v. Wolfram*, 22 Minn. 185; *Osborne v. Morgan*, 130 Mass. 102, overruling *Albro v. Jaquith*, 4 Gray, 99; *Hare v. McIntire*, 82 Maine, 240. In *Southcote v. Stanley*, 1 H. & N. 247, occurs a *dictum* by Pollock, C. B., to the effect that one servant cannot maintain an action against another for injuries caused by the negligence of the latter while engaged in the common employment. This *dictum* does not appear in the report of the case in L. J. (N. S.) Ex. 339, but, according to the latter report, Alderson, B., remarked that he was "not prepared to say that the person actually causing the negligence (*sic*), whether the master or servant, would not be liable."

² *Atkins v. Field*, 89 Maine, 281.

³ See §§ 5, 11, *ante*, and *Hare v. McIntire*, 82 Maine, 240, 245.

⁴ *Rapson v. Cubitt*, 9 M. & W. 710; *George v. Skivington*, 5 Ex. 1; *Parry v. Smith*, 4 C. P. D. 325; *Foulkes v. Metropolitan Railway*, 4 C. P. D. 267, 5 C. P. D. 157; *Ames v. Union Railway*, 117 Mass. 541; *Mulchey v. Methodist Religious Society*, 125 Mass. 487.

⁵ *Albro v. Jaquith*, 4 Gray, 99; *O'Neil v. Young*, 58 Mo. App. 628.

out the contract with his employer, or, in other words, to enter upon the employment, in which case the agent could not generally be guilty of negligence in respect of such employment. On the other hand, if he actually enters upon the employment it is his duty to exercise due and reasonable care in respect of it so as not to cause injury to his fellow-servants or to strangers. If he abandon his work, leaving the matters and things pertaining thereto in a condition dangerous to others, this is not to be taken as non-feasance or doing nothing, but as misfeasance or doing what is wrong. Thus a mine foreman who neglects to examine the roads and ways in use in the mine as required by a statute is personally liable for injuries sustained by a miner by reason of his neglect.¹ So the liability of the defendant servant exists not only for the consequences of active negligence on his part, but for the results of failure of duty in leaving undone, or wrongly done, things which he ought to do carefully ; as where the defendant left a tackle-block and chains carelessly suspended from a ceiling, and these fell, and a fellow-servant was injured. In this case, it was said: "It is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects so to do, the principal is the only person who can maintain an action against him for the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts, and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing ; but it is misfeasance, doing improperly."² An agent of a corporation whose

¹ *Durkin v. Kingston Coal Co.*, 171 Penn. St. 193.

² *Osborne v. Morgan*, 130 Mass. 102. The right of the master, however, against one servant for injuries negligently inflicted upon another rests upon the implied contract between the master and the defendant that the latter will use due and ordinary care not to injure the person or property of his master, and the damages to be recovered in such an action

duty it is to provide safe machinery but who sets an inexperienced employee to work on a machine which the agent knows to be dangerous is guilty of a misfeasance; and the agent and the corporation will be jointly liable for injuries resulting to the employee.¹

SECTION V.

LIABILITY OF EMPLOYER EXTENDED BY STATUTE.

(a) *In Special Cases.*

§ 225. **In the Case of Railway Corporations.** — In many of the States, the rule of the common law which exempts the master from responsibility for injuries suffered by his servants through the negligence of their fellow-servants in the same employment, the master himself being without actual fault, has been abrogated, or modified, in favor of the employees of corporations owning or operating railroads. Thus, in Minnesota,² it is provided that "Every railroad corporation own-

will be for the loss of service or injury to property caused by the defendant's negligence, and never for the bodily injury to the servant, since the master is not liable for this unless he has been negligent in the selection or employment of his servants. See § 10, *ante*, and cases cited *supra*.

¹ *Greenburg v. Whitcomb Lumber Co.*, 90 Wis. 225.

² Minn. Gen. Sts. 1894, § 2701. In Georgia (Code, 1895), the statute is as follows: "§ 2297. Railroad companies are common carriers, and liable as such. As such companies necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees, as to passengers, for injuries arising from the want of such care and diligence. § 2323. If the person injured is himself an employee of the company, and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." See *Central R. R. v. Mitchell*, 63 Ga. 173; *Georgia R. R. & Banking Co. v. Goldwire*, 56 Ga. 196; *Georgia R. R. v. Ivey*, 73 Ga. 409; *Thompson v. Central R. R.*, 54 Ga. 509; *Central R. R. v. Lanier*, 83 Ga. 587; *Georgia R. R. v. Miller*, 90 Ga. 571. In Wyoming, the Territorial law provided that when "any person in the employment of any railroad company in this Territory, may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the

ing or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this State, and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability: provided that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employee, agent, or servant while engaged in the construction of a new road, or any part thereof, not open to public travel or use." It will be observed that the operation of this statute is confined by its terms to the case of employees engaged in operating a railroad, and necessarily exposed to the hazards attending that business; and does not apply to all the employees of the company without regard to the kind of work in which they are engaged;¹ and the statute does not abrogate the ordinary rules as to contributory negligence and the assumption of risk.² Similar

same right of action for damages against said company as if said person so killed were not in the employment of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing, shall be null and void, and shall not be admitted as testimony in behalf of said company in any action for damages which may be brought against them; and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock of said company, or by any other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company; and no agreement to the contrary shall be admitted as testimony in behalf of said company." *Comp. Laws, Wyoming (1876), c. 97, § 1.* In Montana, it is provided that "in every case the liability [of a railway corporation] to a servant or employee acting under the orders of his superior shall be the same in the case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger." *Rev. Stats. 1879, p. 471, § 318.*

¹ *Lavalles v. St. Paul, M. & M. R. R.*, 40 Minn. 249. See *Schneider v. Chicago, B. & N. R. R.*, 43 N. W. Rep. 783 (Minn. 1889); *Northern Pac. R. R. v. Behling*, 57 Fed. Rep. 1037, 6 C. C. A. 681; *Slette v. Railway Co. (Minn.)*, 55 N. E. Rep. 137; *Steffenson v. Railway Co.*, 45 Minn. 355; *Blomquist v. Great Northern R. R.*, 65 Minn. 594.

² *Anderson v. Nelson Lumber Co.*, 67 Minn. 79.

provisions upon this subject occur in the statute in Iowa,¹ and whether the liability be restricted by the terms of the statute or not, the courts are inclined to hold that the statute is intended to be effectual only in favor of persons engaged in and exposed to the risks attending the ordinary operation of railroads.² It is obvious that in the application of the statutes it must often be difficult to determine whether or not the occupation of the injured employee falls within the class which the legislature intended to exempt from the operation of the common-law rule.³ In Florida, a railway company is made liable for injury to an employee, caused by the negli-

¹ The statute provides that "every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by the mismanagement of the engineers or other employees thereof and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use or operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding." Code, 1897, § 2071. This act operates for the benefit only of such employees of a railroad corporation whose occupation exposes them to the hazards incident to the ordinary operation of railways. *Schroeder v. Chicago, R. I. & Pac. R. R.*, 41 Iowa, 344, and see *Deppe v. Chicago, R. I. & Pac. R. R.*, 36 Iowa, 52; *Larson v. Ill. Central R. R.*, 91 Iowa, 81.

² *Missouri Pacific R. R. v. Haley*, 25 Kan. 35; *Solomon R. R. v. Jones*, 30 Kan. 601. In Kansas, it is provided that "every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company, in consequence of any negligence of its agents, or by any misunderstanding of its engineers, or other employees, to any person sustaining such damage." Acts, 1874, c. 93, § 1, Compiled Laws Kansas, 1881, p. 784.

³ See *McKnight v. Iowa & M. R. Const. Co.*, 43 Iowa, 406; *Deppe v. Chicago, Rock Island & Pacific R. R.*, 36 Iowa, 52; *Smith v. Burlington, C. R. & N. R. R.*, 59 Iowa, 73; *Fransden v. Chicago, R. I. & Pac. R. R.*, 36 Iowa, 372; *Potter v. Chicago, R. I. & Pac. R. R.*, 46 Iowa, 399; *Whalen v. Chicago, R. I. & Pac. R. R.*, 75 Iowa, 563; *Locke v. Sioux City R. R.*, 46 Iowa, 109; *Malone v. Burlington, C. R. & N. R. R.*, 61 Iowa, 320; *Handelun v. Burlington, C. R. & N. R. R.*, 72 Iowa, 709; *Rayburn v. Central Iowa R. R.*, 74 Iowa, 637; *Schroeder v. Chicago, R. I. & Pac. R. R.*, 41 Iowa, 344; *Sloan v. Central Iowa R. R.*, 62 Iowa, 728; *Houser v. Chicago, R. I. & Pac. R. R.*, 60 Iowa, 230; *Stroble v. Chicago, M. & St. P. R. R.*, 70 Iowa, 555; *Manning v. Burlington, C. R. & N. R. R.*, 64 Iowa, 240; *Foley v. Chicago, R. I. & Pac. R. R.*, 64 Iowa, 644.

gence of a co-employee;¹ and, in Wisconsin for like injuries, in the absence of contributory negligence on the part of the injured employee, or "when such damage is caused by the negligence of any train-despatcher, telegraph operator, superintendent, yard-master, conductor or engineer, or of any person who has charge or control of any stationary signal, target point, block, or switch."² Under the Fellow-Servant Act of Texas, 1893, it was held that a conductor of a train was a fellow-servant of the engineer if he exercised control over him, but not otherwise.³ In Mississippi, it is held that a railway engineer is not the "superior agent or officer" or "person having the right to control or direct the services" of a brakeman on the train, under Const. 1890, § 193.⁴ Where a statute⁵ provided that an employer should not be liable for injuries to an employee "in consequence of the negligence of another person employed by the same employer in the same general business," it was held that the head brakeman and conductor on a regular freight train were fellow-servants within the meaning of the Act.⁶ In Ohio, prior to the Act of April 2, 1890, it was uniformly held that any person actually having power and authority to direct or control any other employee of the common master was his superior, and that the master was liable for injury caused to the inferior by the act of the superior.⁷ It is held that the above Act did not create any wider rule of liability, excepting in so far as it provides that a superior in one department shall not be the fellow-servant of a subordinate in another.⁸ The ordinary

¹ Sts. (Fla.), c. 3744, § 2. See *Duval v. Hunt*, 34 Fla. 85.

² Laws, 1889, c. 438. See *Kruse v. Chic., M. & St. P. R. R.*, 82 Wis. 568; *Dugan v. Chic., St. P. & R. R.*, 85 Wis. 609; *Albrecht v. Milwaukee & S. R. R.*, 87 Wis. 105; *Hartford v. Northern Pac. R. R.*, 91 Wis. 374; see 218, 220, *ante*.

³ *Moore v. Jones*, 15 Tex. Civ. App. 391. See *Houston & Tex. Cent. R. R. v. Talley*, 15 Tex. Civ. App. 115; §§ 221-223, *ante*.

⁴ *Evans v. Louisville, N. O. & T. R. R.*, 70 Miss. 527.

⁵ Comp. Laws, Dakota, 1887, § 3753.

⁶ *Northern Pacific R. R. v. Hogan*, 27 U. S. App. 184.

⁷ See *Little Miami R. R. v. Stevens*, 20 Ohio, 415; *Lake Shore & Mich. Cent. R. R. v. Lavalley*, 36 Ohio St. 221; *Alexander v. Penn. Co.*, 48 Ohio St. 623, and cases cited.

⁸ *Balt. & Ohio R. R. v. Camp*, 31 U. S. App. 213.

rule of fellow-servant is held to be abrogated by the civil code of California, § 1970.¹

§ 226. **Such Statutes not Unconstitutional. Enforced by the Federal Courts.** — By the code of Iowa,² it was provided that every railway corporation, or its lessee, operating a railroad within the State, should be liable for all injuries occurring to the employees of such corporation in consequence of the neglect of a co-employee in the performance of his duty to the company. The constitution of Iowa³ provides that “all laws shall be general and of uniform operation throughout the State;” and the Supreme Court of the State held that the statute, as operating uniformly upon all persons under the circumstances contemplated by it, was constitutional.⁴ In the Circuit Court of the United States for the Northern District of Iowa, it was contended that the statute was repugnant to the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” but the court affirmed the constitutionality of the statute. Upon the question being carried to the Supreme Court of the United States, the judgment of the Circuit Court was affirmed, in a majority opinion.⁵ Later, the same question arising upon the interpretation of the statute of Kansas,⁶ the constitutionality of the statute was affirmed, and the court said: “The only question . . . is whether it is in conflict with the clauses of the Fourteenth Amendment. . . . The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or its directors. But the same hardship and injustice, if there be any, exist when the company without any wrong or negligence on its part is charged for

¹ Davis v. Southern Pacific Co., 98 Cal. 19.

² 1873, c. 5, §§ 1288, 1307. See § 225, *ante*.

³ Art. 3, § 30.

⁴ McAunich v. Mississippi & Missouri R. R., 20 Iowa, 338; Deppe v. Chicago, Rock Island & Pacific R. R., 36 Iowa, 52; Bucklew v. Central Iowa Railway, 64 Iowa, 603.

⁵ Chicago & Northwestern R. R. v. McLaughlin, 119 U. S. 566.

⁶ Compiled Laws, Kansas, 1881, p. 784. See § 225, *ante*.

injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. . . . The law . . . extends this doctrine, and fixes a like liability upon railroad companies, where injuries are suffered by employees, though it may be by the negligence or incompetency of a fellow-servant in the same general employment, and acting under the same immediate direction. That its passage was within the competency of the legislature, we have no doubt. The objection that the law . . . deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. . . . The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objection therefore can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. . . . It is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches and to persons and corporations using steam in manufactories.”¹ While the ques-

¹ *Missouri Pacific R. R. v. Mackey*, 127 U. S. 205, opinion by Field, J. See *Soon Hing v. Crowley*, 133 U. S. 703; *Barry v. McGhee*, 100 Ga. 759; *Schoolcraft v. Louisville & N. R. R.*, 92 Ky. 233; *Missouri Pacific Railway v. Humes*, 115 U. S. 512. In the latter case it was held that a statute was not unconstitutional which imposed upon every railroad corporation in the State certain duties as to fencing its line. The court said: “The objection that the statute . . . violates the clause of the Fourteenth Amendment which prohibits a State to deny to any person within its jurisdiction the equal protection of the laws, is . . . untenable.

tion who are fellow-servants at common law is one of general jurisprudence, as to which the Federal Courts are not generally controlled by the local decisions,¹ yet, in the absence of an act of Congress relating to the liability for negligence of interstate railways, it is competent for a State to declare that an employee of any railroad doing business in a State shall be deemed, in respect to his acts within the State, the superior, not the fellow-servant of other employees placed under his control; and the Federal Courts are bound to enforce such enactments although these abrogate the principles of the common law.²

(b) *Statutes applied to Employers, Generally.*

§ 227. **The English Employers' Liability Act.** — The somewhat strict application, in favor of the master, by the English courts, of the doctrines of "Employees' Risk,"³ "Common Employment," and "Vice-Principal,"⁴ led to the enactment, first, of the Employers & Workmen Act of 1876,⁵ and, later, of the Employers' Liability Act of 1880, sometimes called the "Gladstone Act."⁶ The substance of this Act has been adopted into the legislation of Alabama⁷ and Massachusetts,⁸ and as like rules are applied to the interpretation of the corresponding statutes in those States and of the English Act, the important sections of the latter Act are printed in this place: —

"Sect. 1. Where, after the commencement of this Act, personal injury is caused to a workman (1) By reason of any

. . . The statute makes no discrimination against any railroad company.
 . . . Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle-guards, is exacted.
 . . . There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances."

¹ Chapman v. Reynolds, 38 U. S. App. 686.

² Peirce v. Van Dusen, 47 U. S. App. 339. See § 139 *a*, *ante*, and cases cited.

³ See § 209, *ante*.

⁴ See § 217, *ante*.

⁵ 38 & 39 Vict. c. 90.

⁶ 43 & 44 Vict. c. 42.

⁷ Civil Code, 1896; c. 43, § 1749.

⁸ Acts, 1887, c. 270. See amendments by Acts, 1888, c. 155; 1892, c. 260; 1893, c. 359; 1894, c. 499; 1897, c. 491.

defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer ; or (2) By reason of any negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence ; or (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed ; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.

Sect. 2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases ; that is to say, (1) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition. (2) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned ; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of her Majesty's principal secretaries of state, or by the Board of Trade, or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or by-law.

Sect. 4.¹ An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death; provided always that in case of death the want of notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.²

Sect. 7. Notice in respect of injury under this Act shall give the name and address of the party injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered. Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body. A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury

¹ Section 3 provides a rule of damages under the Act, based upon the earning of persons in like employment with the plaintiff, during the three years preceding the injury.

² Sub-section 5 of section 1 provides that there shall be deducted from the damages in any case the amount of any penalty, or part of a penalty, which, under any other Act of Parliament, may have been paid to the plaintiff or his representatives, in respect of the same cause of action. Section 6 fixes the jurisdiction of the county and superior courts in respect of actions brought under the Act.

mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading. Sect. 8. For the purposes of this Act, unless the context otherwise requires, — The expression 'person who has superintendence intrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor: The expression 'employer' includes a body of persons corporate or unincorporate: The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies. Sect. 9. This Act shall not come into operation until the 1st day of January, 1881, which date is in this Act referred to as the commencement of this Act. Sect. 10. This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the 31st day of December, 1887,¹ and to the end of the then next session of Parliament, and no longer, unless Parliament shall otherwise determine, and all actions commenced under this Act before that period shall be continued as if the said Act had not expired."

§ 228. *Interpretation of the Act.* — In those cases provided for by the terms of the Act in which the common law gives the employee a remedy, he still has, at common law, a right to sue under the same conditions, and to recover damages to the same extent, as if the Act had not been passed.² And the notices required to be given, under the Act,³ so far as these

¹ The Employers' Liability Act has been continued from time to time by the "Expiring Laws Continuance Acts."

² *Ryalls v. Mechanics' Mills*, 150 Mass. 190; *Coughlin v. Boston Tow-boat Co.*, 151 Mass. 97; *Clark v. Merchants' & Miners' Transportation Co.*, 151 Mass. 352; *Morrison v. Baird*, 10 Ct. of Sess. Cas. (4th series), 271; *M'Donagh v. McLellan*, 13 Ct. of Sess. Cas. (4th series), 1000. It is held in Alabama that the liability of the employer under the statute does not arise out of the contract of employment which merely establishes the relation of master and servant: and so a servant injured in another State by the negligence of a fellow-servant under circumstances which would not create liability in that State, cannot recover against his employer in Alabama, although the contract was entered into and the services partly performed here. *Alabama Gt. So. R. R. v. Carroll*, 97 Ala. 126. See §§ 28, 29, *ante*.

³ 43 & 44 Vict. sect. 2, sub-sect. 3; sect. 8; Mass. Acts, 1887, c. 270, § 3;

are applicable to the causes of action for which it provides, are necessary only in those cases, if any, in which there is no

Ala. Code, 1896, § 1749, cl. 5. While the notices required by the statute are not to be construed with technical strictness, they should at least appear to be intended for the basis of a claim against the municipality, and to be given on behalf of the person who brings the suit. *Driscoll v. Fall River*, 163 Mass. 105. See Mass. Act, 1888, c. 155. The notice will be sufficient if it conveys substantially to the mind of the person to whom it is given the name and address of the person injured and the time and cause of the injury. Thus a letter from the plaintiff's solicitor gave the date of the injury and stated that the plaintiff had been for some time under treatment at a hospital "for injury to his leg." It was held that, considering the proviso, sec. 7, that the notice "shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge . . . shall be of the opinion that the defendant is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading, the defect in the notice did not render it invalid. *Stone v. Hyde*, 13 Q. B. D. 76; see *Clarkson v. Musgrave*, 13 Q. B. D. 386; *Brick v. Bosworth*, 162 Mass. 334. When a notice is given, purporting to be in behalf of the injured person, by an attorney at law, especially if he afterwards represents the plaintiff in his action, express authority to give the notice may be presumed, in the absence of anything to defeat that presumption. *Steffe v. Old Colony R. R.*, 156 Mass. 262. The mere omission of a date may not render the notice invalid. *Carter v. Drysdale*, 12 Q. B. D. 91. But a mere verbal notice will not be sufficient. *Moyle v. Jenkins*, L. R. 8 Q. B. D. 116, and see *Keene v. Millwall Dock Co.*, L. R. 8 Q. B. D. 482. It is held even if the notice required by the third clause of the Act does not sufficiently designate the cause of the injury, that the employee may recover, if there is evidence for the jury in the case that there was no intention to mislead and that the employer was not in fact misled by the notice. *Drommie v. Hogan*, 153 Mass. 29. By the Mass. St. 1888, c. 155, amending the Employers' Liability Act, Acts, 1887, c. 270, it is provided that the notice required by the statute "shall be in writing, signed by the person injured or by some one in his behalf." It was held that under this provision, the notice required to be given upon the instantaneous death of a person, may be given by his widow. *Gustafsen v. Washburn & Moen Manuf'g Co.*, 153 Mass. 468; and, in a later case, that the notice might be given by some one in the decedents' behalf written 30 days from the occurrence of the accident; or by the decedent's executor or administrator within 30 days after his appointment. *Daly v. N. J. Steel & Iron Co.*, 155 Mass. 1; *Jones v. Boston & Albany R. R.*, 157 Mass. 51. See Mass. Act, 1888, c. 155; Act, 1892, c. 260. A notice is not defective because it states different causes of the same accident, each of which is adequately stated. *Coughlan v. Cambridge*, 166 Mass. 268. It is held that if the notice is not served until after the writ is made,

right of action at common law ; unless a plaintiff, having a remedy at common law, should elect to rely upon the statute alone.¹ In the cases provided for by the Act, the master cannot avail himself of the defence that the injury was caused by the negligence of the fellow-servant of the plaintiff ; but contributory negligence on the part of the plaintiff himself will be a defence, and so will be the failure to give the notices prescribed by the Act, when the action rests solely upon the rights given by the statute.² The burden of proof rests upon the plaintiff, and if the testimony in the case is as consistent with carelessness on his part as with the exercise of due care, he cannot maintain his action.³ The Act⁴ does not give the administrator of an employee a right of action against an employer for causing the employee's death, in addition to the right, as legal representative, to recover damages which accrued to the intestate in his lifetime. The statute does not purport to make the death a substantive cause of action. It gives only the right of compensation and remedies, and it gives them to the employee or his legal representative in case of his death. It implies that his representatives are merely to succeed to his rights and remedies. The law recognizes no right of compensation for the death of a person, and gives to a deceased person no remedies founded on his death.⁵ By the Interpretation Clause of the English Act⁶ it is provided that the expression "workman," as used in the Act, shall mean "a railway servant and any person to whom the Employers and

although the notice is left at the defendant's house on the day of the date of the writ, the action cannot be maintained. *Veginan v. Morse*, 160 Mass. 143.

¹ *Ryalls v. Mechanics' Mills*, 150 Mass. 190.

² *Weblin v. Ballard*, 17 Q. B. D. 122.

³ *Shea v. Boston & Maine R. R.*, 154 Mass. 31. See §§ 111, 135, *ante*. The rule might be different in jurisdictions where it is held that contributory negligence is a matter of defence to be alleged and proved affirmatively by the defendant. See § 136, *ante*.

⁴ 43 & 44 Vict. c. 42, section 1, sub-sect. 5 ; Mass. Act, 1887, c. 270, § 1, cl. 3, § 3 ; Code Ala. 1896, § 1752.

⁵ *Ramsdell v. New York & New England R. R.*, 151 Mass. 245 ; *Dacey v. Old Colony R. R.*, 153 Mass. 112. See §§ 15, 16, *ante*, notes and cases cited.

⁶ Sect. 8.

Workmen Act, 1875,¹ applies." The latter Act, being for the benefit of railway servants and others, and persons "otherwise engaged in manual labor," it was held that the driver of a tram-car was not a person to whom the . . . Act of 1875 applied, and therefore that he was not entitled to the benefit of the Employers' Liability Act. The court said: "It is manifest from the interpretation clause of the Employers and Workmen Act . . . which is substantially made a part of the Employers' Liability Act . . . that the latter Act was only intended to apply to a class, limited by that clause. A driver is clearly not within any of the terms mentioned in the section, but it is said that he is 'otherwise engaged' in manual labor. The expression used, it should be noted, is not manual work, but manual labor, for many occupations involve the former and not the latter, such as telegraph clerks, and all persons engaged in writing. I cannot see the distinction between driving and other occupations which involve no manual labor, though they do involve manual work."² So it is held that an omnibus conductor is not a person to whom the Act of 1875 applies, and so that he is not entitled to the benefit of the Employers' Liability Act.³ It is believed that the soundness of the somewhat nice distinction between manual work and manual labor taken in these cases has not been passed upon in any of the American cases upon the subject.

§ 229. **Same Subject: How far the Act changes the Rule of the Common Law.** — The English cases hold that the pur-

¹ 38 & 39 Vict. c. 90. In this Act, § 10, the expression "workman" does not include a domestic or menial servant, but, otherwise, includes any person who, being a laborer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labor, whether he be of full age or not, has entered into or works under a contract express or implied, with an employer, personally to execute any work or labor.

² *Cook v. North Metropolitan Tramways Co.*, 18 Q. B. D. 683.

³ *Morgan v. London General Omnibus Co.*, 13 Q. B. D. 832. Where the plaintiff had engaged with the defendant to assist him "as a practical working mechanic in developing ideas" the defendant "might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business," it was held that the plaintiff was not "a mechanic or workman" within the meaning of the Act of 1875. *Jackson v. Hill*, 13 Q. B. D. 618.

pose of the Act is to put the servant, as respects his remedy for injuries received while in the performance of his service, on the same footing as a stranger coming upon the premises by right to transact business with the master.¹ And it is obvious that the effect of the Act must be to modify the strict rule laid down in the leading case of *Wilson v. Merry*,² under which it was held by the English courts that the duty of the master was fulfilled, as to providing suitable and safe machinery and appliances for doing the work, when he had provided such as were reasonably safe in the first instance. But it has been stated that the weight of authority in the United States holds that the master's duty to provide suitable appliances is a continuing duty which he cannot avoid by delegation.³ It is apprehended, then, that, in this respect, the effect of the English Act is to apply to the cases the rule which had already been held, at common law, by the American courts. It is said, however, in Massachusetts, that the Act "so far changes the common law as to give a right of action to a servant who is injured by a defect in the machine, tool, or appliance itself which is furnished for his use, although such defect arose from the negligence of a fellow-servant whose duty it was to see that the machine, tool, or appliance was in a proper condition."⁴ It would seem that this expression is to be taken to refer to the rule of the common law as laid down in the English cases already referred to, since the rule is well established, in Massachusetts, that the negligence of the person charged with seeing that appliances for doing the work are in proper condition, is the negligence of the master for which he will be responsible to the injured servant;⁵ and it is said that, before the passage of the Employers' Liability Act, "it was settled in Massachusetts that masters were personally bound to see that reasonable care was used to provide reasonably safe and proper machinery, so that, if duty was intrusted to another,

¹ *Thomas v. Quartermaine*, 17 Q. B. D. 414, 420.

² L. R. 1 H. L. Sc. 326.

³ See § 193, *ante*, notes and cases cited.

⁴ *Ashley v. Hart*, 147 Mass. 573.

⁵ *Ford v. Fitchburg R. R.*, 110 Mass. 240; *Lawless v. Connecticut River R. R.*, 136 Mass. 1; *Rogers v. Ludlow Manufg Co.*, 144 Mass. 198.

and was not performed, the fact that the proximate cause of the damage was the negligence of a fellow-servant was no defence.”¹

§ 230. **Same Subject: Doctrine of “Employees’ Risk,”** how affected by the Act: Case of *Thomas v. Quartermaine* discussed. — It has been stated that the tendency of the American cases is to hold that when the employee is injured by reason of patent defects existing in machinery or appliances with which he works, the question of his right to maintain an action for such injuries will depend upon whether or not he was guilty of contributory negligence in continuing in the employment under such circumstances; it being considered that he does not, as a matter of law, assume the absolute risk of injury.² The English cases, however, hold that the employee assumes, when he enters upon the employment, all risks arising from defects in machinery or appliances, so long as these are open to observation.³ And this doctrine is not without support in the United States.⁴ From the earlier expressions upon this subject, it would seem that the English court was disposed to hold that this rule of absolute risk was modified, in favor of the servant, by the Employers’ Liability Act, it being the intent of the statute to put the servant upon the same footing, as regards his right of action for injuries received, with a stranger.⁵ In a later leading case, however, it was held, in a majority opinion, that the defence arising from the application of the doctrine of “Employees’ Risk,” had not been affected by the Act.⁶ In this case, the master was owner of a brewery, in which was a vat full of scalding fluid. Around this was a

¹ *Ryalls v. Mechanics’ Mills*, 150 Mass. 190, 194.

² See *Kane v. Northern Central R. R.*, 128 U. S. 91; *Jones v. East Tennessee, Va. & Ga. R. R.*, 128 U. S. 443, and other cases cited, §§ 207, 209, *ante*.

³ See *Priestley v. Fowler*, 3 M. & W. 1; *Williams v. Clough*, 3 H. & N. 358; *Seymour v. Maddox*, 16 Q. B. 326; 20 L. J. Q. B. 327, and other cases cited, § 209, *ante*.

⁴ See cases cited, § 209, *ante*.

⁵ *Weblin v. Ballard*, 17 Q. B. D. 122.

⁶ *Thomas v. Quartermaine*, 18 Q. B. D. 685, per Bowen and Fry, L. J., Lord Esher, M. R., dissenting. See also *Yarmouth v. France*, 19 Q. B. D. 647.

rim of low height, and near it a boiling vat, from under which the plaintiff, in the performance of his duty, attempted to pull a board, which came out more quickly than he expected, so that he fell back into the scalding fluid and was injured. On appeal, giving the opinion of the majority of the court, Bowen, L. J., said: "Sect. 1 of the statute provides that: 'Where personal injury is caused to a workman by reason of any defect in the condition of the employer's works,' and in four specified instances by reason of negligence of others in the employer's service, 'the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work.' Does this language do more than remove such fetters on the workman's right to sue as had previously been held to arise out of the relation of master and workman? . . . An enactment which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot, except by a violent distention of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman, and other rights in addition." Proceeding then upon the assumption, which seems to be admitted as sound in most of the decided cases, that the master, under the Act, owes to the workman such duties and such only as he would owe to a third person who should enter the premises by his invitation or procurement to transact business with him, the court says: "In the absence of any further act of omission or commission by the occupier of the premises, or his servants, or of any disregard of statutory provisions, or of individuals' rights, can it properly be said that there has been upon his part any breach of duty towards a person who, knowing and appreciating the danger and risk, elects voluntarily to encounter them?" In another part of the opinion it is said: "Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me to be complete." The court would thus seem to assume, as matter of law, that whoever knowing the condition of premises approaches or enters them, does this at his peril as

being conclusively presumed justly to appreciate the danger which he encounters in so doing, — a doctrine which is opposed to the general tenor of authority.¹ And it is apprehended that the rule is firmly settled that the question whether any one entering a place in fact dangerous was guilty of contributory negligence in so doing is one of fact, unless the circumstances of danger were so grave and apparent as to convince any reasonable person, at once, that the act of entering was reckless. The court says further: "I employ a builder to mend the broken slates on my roof, and he tumbles off. Have I been guilty of any negligence or breach of duty towards him? Was I bound to erect a parapet round my roof before I had its slates mended? In the case now before us the negligence relied on by the plaintiff is that a vat in the room in which he worked was left without a railing. Let us suppose that the defendant, impressed with the danger, had actually sent for a builder to put one up, and the builder had fallen in while executing the work. Would the defendant have been guilty of a breach of duty towards the builder?" The reasoning of the court upon this branch of the argument, so far as it is drawn from the illustrations adduced, seems to rest upon an apparent fallacy. For it is evident, in the case of the slater, that the danger of falling from the roof is a danger manifestly and always attending the business of slating roofs, and not a defect for which the owner of the house is responsible; and an analogous objection suggests itself to the proposition that the workman sent for to make the vat safe, if he falls into it, is injured by reason of a defect in the appliances furnished him for doing his work; the prescribed work itself being to make that safe by the existence of which he is injured, and the risk of injury from which he clearly must assume, the danger being inseparable from the doing of the work. Again, it is apprehended that if a stranger were invited to come upon the premises to do business with the owner, and by reason of falling into a vat carelessly left open, was injured, the questions of the negligence of the parties respectively, in an action for damages suffered by reason of

¹ See *Clarke v. Holmes*, 7 H. & N. 937; §§ 144, 145, *ante*, notes and cases cited.

the injury, would be for the jury; and the assumption that the servant injured by falling into the vat would, if permitted to sue for the injury, be put in a better position than a stranger, would seem to be at least doubtful. It is difficult to reconcile the expressions already quoted with that which follows, that "it was said, and said rightly, in *Weblin v. Ballard*,¹ that in an inquiry whether the plaintiff has been guilty of contributory negligence, the plaintiff's knowledge of the danger is not conclusive. Obviously such knowledge may have even led him to exercise extraordinary care." But the court says further: "The doctrine of *volenti non fit injuria* stands outside the defence of contributory negligence and is in no way related to it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all." This expression may be admitted to embody a correct definition of the rule of Employees' Risk, as laid down generally by the English and by some of the American courts,² but it has never been attempted to apply a like doctrine of risk to any except employees, plaintiffs; and considering the admission with which the opinion starts out that the intent of the Act was to place employees upon the same footing, in respect of remedies, as strangers, it is difficult to understand how, under the Act, they are still to be taken as precluded by a risk which a stranger would not be assumed to take. In Alabama, it is held that the statute does not apply to the known risks and dangers of the service, nor relieve the employee from the obligation to use due care;³ but that the plaintiff is not to be held to assume the risk of the results of the employer's negligence.⁴

§ 231. **Same Subject.** — While the majority opinion in *Thomas v. Quartermaine* must be taken as establishing the construction of the English Act, it is apprehended that that is the more reasonable view of the law, as expressed in the dis-

¹ 17 Q. B. D. 122.

² See § 209, *ante*.

³ *Mobile & Ohio R. R. v. George*, 94 Ala. 199; *Birmingham Railway v. Allen*, 99 Ala. 359; *Bridges v. Tenn. Coal Co.*, 109 Ala. 237.

⁴ *Woodward Iron Co. v. Andrews*, 114 Ala. 243.

senting opinion, in the same case, of Lord Esher, M. R., which holds in effect, that, under the Act, the conclusive presumption that the employee takes the risk is removed ; and that the question, as in other cases, will be : was the employee, in fact, in entering upon, or continuing in the employment, under the circumstances, guilty of contributory negligence ? Lord Esher says: "The first thing to consider is what is the true construction of the Employers' Liability Act, 1880. It has been suggested that this Act has only the effect of doing away with the doctrine of the immunity of the master from damage arising from the negligence of another servant in the common employment of the master. To my mind it is clear that the statute has taken away from the master another defence. It was, no doubt, held that a servant could not sue a master for injuries arising from the negligence of a fellow-servant, but it was also held that a man who went into any employment undertook to take all the ordinary risks incident thereto, unless they were concealed or were known to the master and not to the servant. It seems to me clear that the Act has taken away that defence from the master. I can see no difference between contracting to take a risk upon one's self and undertaking an employment to which the risk attaches. No one ever suggested that there could be such a contract in the case of any person other than a servant, so that when a servant is put on a footing with other persons that defence of the master is gone. The case is reduced therefore to a personal action founded on negligence. It is said that you cannot have a liability for negligence except it be founded on a duty. The duty, however, is, that you are bound not to do anything negligently so as to hurt a person near you, and the whole duty arises from the knowledge of that proximity. Whether the negligence is your personal act, or arises from using your property in a particular way, the rule equally applies, and you must so use your personal powers or property as not to injure any other person if by the exercise of reasonable care you can avoid so doing. In an action for injuries arising from negligence, it was always a defence that the plaintiff had failed to show that as between him and the defendant the injury had happened solely by the defendant's negligence. If the plain-

tiff by some negligence on his part directly contributed to the injury, it was caused by the joint negligence of both, and no longer solely by the negligence of the defendant, and that formed a defence to the action. It seems to me that the Act recognizes, if it does not impose, a duty on the part of the master not to have his ways, machinery, or plant in such a defective condition as to cause injury to the servant, and if he fails in this he is not at liberty to set up that the injury arose by the negligence of a fellow-servant of the plaintiff, nor that the plaintiff, whether he knew or did not know of the defect, had contracted that he would take the risk on himself. The question therefore is, was the master negligent in allowing a defect to exist in the works by reason of which defect the injury has arisen, and if that is established, was the plaintiff guilty of negligence directly contributing to the injury he has sustained? . . . The knowledge of the plaintiff of the want of care of the defendant is not conclusive against the former, though it is a material fact for the consideration of the jury in determining whether, under all the circumstances, the plaintiff was guilty of contributory negligence. The case of *Clarke v. Holmes*¹ has been observed upon, but it has never been overruled, and it seems to me to be this case. . . . The fact, then, of the knowledge of the servant is not conclusive against him. It is said that there is a difference which arises where there is a statutory duty thrown on the master to fence machinery, but it seems to me that exactly the same question arises, and I cannot accede to that argument." Considering that the admitted purpose of the Act is to place workmen upon the same footing as strangers, as respects their right to recover for injuries received through the negligence of the master, it seems difficult to avoid the conclusion, the negligence of the master being admitted, and it being also admitted that the workman at common law took the risk of injury from obvious defects, that the reasonable construction and effect of the Act should be to make the plaintiff's right to recover in any case to depend upon the question of fact whether he was or was not, in doing what he did, guilty of contributory negligence. Whether the rule held by the majority of the

¹ 7 H. & N. 937, 31 L. J. Ex. 356.

court in *Thomas v. Quartermaine* that the employee accepts the risk of injury from defects in machinery and appliances, if these be apparent, and that this risk is not removed by the Act, be sound or not, there can be no doubt that, under the Act, the risk still subsists as to dangers which are the usual and necessary concomitants of the work to be done; since these dangers do not arise out of any negligence on the part of the master, and it is not to be supposed that the legislature intended to make the master the insurer of the safety of the employee. So, if the employee voluntarily undertake, out of the line of his duty, to perform dangerous work, as to repair defective machinery, he will take the risk of injury in doing the work, since he will be acting not as a servant of his master but as a mere intermeddler.¹

§ 332. **Defect in Ways, Works, Machinery, or Plant, what.** — The English Act applies when the accident is the result of “any defect in the condition of ways, works, machinery, or plant, connected with or used in the business of the employer,”² and a similar provision occurs in the American statutes.³ It is held, generally, that the test whether the machinery or plant be defective or not, within the meaning of the statute, is whether the machine was fit or unfit for the purpose to which it was customarily applied; and the same test is applied as to a way.⁴ The words “defect in the condition of the . . . machinery” do not refer to its working capacity, but to its condition in regard to the safety of the

¹ *Mellor v. Merchants' Manuf'g Co.*, 150 Mass. 362. In this case, an employee in a mill had undertaken, of his own free will, to repair a dangerous pulley, and was injured in so doing, and it was held that the master was not responsible for his injuries. It is apprehended that the case was rightly decided upon the ground stated in the text; and that, although the court seem to approve the majority opinion in *Thomas v. Quartermaine*, the Massachusetts case stands upon different ground.

² Act 43 & 44 Vict., c. 42, sect. 1, sub-sect. 1.

³ Mass. Acts, 1887, c. 270, § 1, cl. 1; Ala. Code, 1886, § 2590, cl. 1. The Massachusetts statute omits the word “plant.”

⁴ *Heske v. Samuelson*, 12 Q. B. D. 30; *Cripps v. Judge*, 13 Q. B. D. 583; *Thomas v. Quartermaine*, 17 Q. B. D. 414, 418. A “lift,” or elevator, which is, in itself, in a dangerous condition, is within the class of dangerous machinery contemplated by the Act. *Heske v. Samuelson*, *supra*.

employees; and if such a defect may be remedied by a temporary device so as to remove danger, a failure to make use of such a device may be negligence for which the employer may be responsible.¹ The word "works" means works already completed, and not works in the course of construction which are, on completion, to be connected with or used in the master's business.² The statute applies to cases where the plant is unfit for the purpose for which it is used, although no particular part of it is shown to be unsound. Thus an employee was injured by the breaking of a ladder which was used to support a scaffold and which was not sufficient for that purpose, and the scaffold and ladder had been placed and were being used under the direction of the defendant, and it was held that the defendant might be liable under the Act.³ The mere fact that a machine is dangerous does not show that it is defective within the meaning of the Act, since the only defects for which the master is liable are defects the existence of which indicates negligence on the part of the master, or of some one who has been intrusted by him with the duty of seeing that the machinery is in a safe condition.⁴ Thus the words "ways, works, and machinery" do not include a trestle, the foundation of which was washed out by an extraordinary flood, if the trestle was built in the manner common on the best managed roads and it had afforded a safe passage for the defendant's trains for fifteen years.⁵ It is said: "A machine is a piece of mechanism which, whether simple or compound, acts by a combination of mechanical parts, which serve to create or apply power to produce motion, or to increase or regulate the effect. . . . The carding, spinning, and weaving machines, together with the instrumentality by which the prime motive power is created or applied, constitutes the machinery of a cotton-mill. When cars, though used at

¹ *Willey v. Boston Electric Light Co.*, 168 Mass. 40.

² *Howe v. Finch*, 17 Q. B. D. 187.

³ *Cripps v. Judge*, 13 Q. B. D. 583, and see also *Heske v. Samuelson*, 12 Q. B. D. 30.

⁴ See *Walsh v. Whiteley*, 21 Q. B. D. 371; *Paley v. Garnett*, 16 Q. B. D. 52.

⁵ *Columbus & Western R. R. v. Bridges*, 86 Ala. 448.

times, and at other times detached, are formed into a train, to which the propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the business.”¹ So a mere tool or instrument, such as a hammer used for driving spikes into railway ties, is not machinery, within the meaning of the Act.² It is held that movable stairs intended to furnish permanent access to a cellar in which the employer was making alterations for the owner of the building are not part of the employer’s ways, works, and machinery;³ and so with a movable scaffolding made to be set up in different places in the master’s mill or yards;⁴ or a temporary staging put up by the employee or his fellow-servants for the purpose of painting a building;⁵ or ladders spliced together by the employees for the same purpose;⁶ or a temporary staging put up by the employees, on the land of a third person.⁷ The course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part where the business is done, when the business of the employer requires him so to do, is regarded as a “way” within the meaning of the statute.⁸ A car in use by, or in the possession of a railroad, is a part of the ways, works, and machinery of

¹ See *Dacey v. Old Colony R. R.*, 153 Mass. 112. A wire which is a part of the electric signal service of a railroad, used to connect the joints of the rails so as to insure the transmission of the electric current, affixed to the rail at either end, and following the rail until it reaches a sleeper, then running out on the sleeper in a loop, and there fastened by staples, is a part of the ways, works, or machinery of the railroad. *Brouillette v. Conn. River R. R.*, 162 Mass. 198.

² *Georgia Pacific R. R. v. Brooks*, 4 So. Rep. 289 (Ala. 1888). But where a ladder was not in proper condition for the purpose for which it was used, it was held that there might be a recovery under the Act. *Webb v. Ballard*, 17 Q. B. D. 122.

³ *Regan v. Donovan*, 159 Mass. 1.

⁴ *Prendible v. Conn. River Manuf’g Co.*, 160 Mass. 131.

⁵ *Adasken v. Gilbert*, 165 Mass. 443; or for slating a roof, *Reynolds v. Barnard*, 168 Mass. 226.

⁶ *McKay v. Hand*, 168 Mass. 270.

⁷ *Burns v. Washburn*, 160 Mass. 457.

⁸ *Willetts v. Watt* (1892), 2 Q. B. 98; *Dolphin v. Plumley*, 167 Mass. 167; and see *Hanlon v. Thompson*, 167 Mass. 190.

the railroad, whether the car is owned by it or by some other company.¹ A number of cars coupled together, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic, under an impetus imparted to them by a locomotive which has been detached, constitutes a "train" within the meaning of the Act.² It has been held that a railway track in the yard of A., owned, maintained, and repaired by him, and used by a railroad under a contract with him for the delivery of freight in the yard, is not a part of the railroad's "ways."³ While it may not be necessary, in order to render an employer liable for an injury occurring to an employee through a defect in ways, works, and machinery, that these should belong to him, it should at least appear that he has the control of them, and that they are used by his authority, express or implied. Thus the occasional use by each of two railway companies of the tracks of the other in delivering and taking cars in the ordinary course of business will not make the tracks of each a part of the ways, works, and machinery of the other.⁴ The inference is that the employer shall be liable when a contractor does part of his work and an employee of the contractor is injured by reason of a defect in the condition of the ways, works, machinery, or plant furnished by the employer to the contractor which has not been discovered or remedied by reason of the negligence of the employer, or of some person intrusted by him with the duty of seeing that the appliances were in proper condition. By the negligence of the employer is intended his own negligence as distinguished from that of his servant or superintendent.⁵

§ 233. **As to Persons exercising Superintendence.** — The English Act applies when the injury occurs "by reason of

¹ *Bowers v. Conn. River R. R.*, 162 Mass. 312. See *Fay v. Minn. & St. L. R. R.*, 30 Minn. 231.

² *Caron v. Boston & Albany R. R.*, 164 Mass. 523. See *Dacey v. Old Colony R. R.*, 153 Mass. 112.

³ *Engel v. N. Y., Prov. & Boston R. R.*, 160 Mass. 260. See the elaborate dissenting opinion by Knowlton, J.

⁴ *Trask v. Old Colony R. R.*, 156 Mass. 268; *Coffee v. N. Y., N. H. & H. R. R.*, 155 Mass. 21.

⁵ *Toomey v. Donovan*, 158 Mass. 232.

any person in the service of the employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence; ¹ or by reason of the negligence of any person in the service of the employer, to whose orders or directions the workman, at the time of the injury, was bound to conform, and did conform, where such injury resulted from his having so conformed." ² Under the interpretation clause of the Act, ³ it is considered that the expression, "person who has superintendence intrusted to him," means, ordinarily, a person whose sole or principal duty is that of superintendence, and who is not customarily engaged in manual labor; but the mere fact that the superintendent sometimes performs labor will not relieve the master from liability. ⁴ Thus the plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship, the workmen being divided into gangs, each under a foreman. The foreman of the plaintiff's gang was himself a laborer, working on deck, and giving a signal to the men below when bales were to be dropped into the hold. The plaintiff was injured by a bale which was dropped without sufficient warning. It was held that the foreman was not a person to whom superintendence had been intrusted, and that it did not appear that the injury

¹ Sec. 1, sub-sect. 3. See Mass. Act, 1887, c. 270, § 1, cl. 2; Code, Ala. 1886, § 2590, cl. 2. If a superintendent of drunken habits, known to the master, knowingly employs an intoxicated workman and orders him to do an act manifestly dangerous to another workman, who is thereby injured, the master is liable for such injury, both at common law and under the Employers' Liability Act. *McPhee v. Scully*, 163 Mass. 216.

² Sect. 1, sub-sect. 4. See Code, Ala., 1886, § 2590, cl. 3.

³ Sect. 8.

⁴ *Kansas City, M. & B. R. R. v. Burton*, 97 Ala. 240. See *McPhee v. Scully*, 163 Mass. 216; *O'Neil v. Leary*, 164 Mass. 387; *Davis v. N. Y., N. H. & H. R. R.*, 159 Mass. 532; *Prendible v. Conn. River Manuf'g Co.*, 160 Mass. 131; *Crowley v. Cutting*, 165 Mass. 436; *Adasken v. Gilbert*, 165 Mass. 443; *O'Brien v. Rideout*, 161 Mass. 170; *Mahoney v. N. Y. & N. E. R. R.*, 160 Mass. 573; *Gardner v. N. E. Telephone Co.*, 170 Mass. 156; *Reynolds v. Barnard*, 168 Mass. 226; *Green v. Smith*, 169 Mass. 485. The engineer of a railway train is said to be not, ordinarily, a person who has "superintendence intrusted to him," *Dantzler v. De Bardebelen Co.*, 101 Ala. 309, but he is held to be a superintendent as to his fireman. *Culver v. Ala. Midland R. R.*, 108 Ala. 330.

resulted from the plaintiff's having conformed to any order of the foreman, even assuming that the foreman was a person to whose orders the plaintiff was bound to conform.¹ An employee may have two duties; he may be a superintendent for some purposes and also an ordinary workman, and if he is negligent in the latter capacity the employer is not answerable. Unless the act complained of is one of direction or oversight, tending to control others and to vary their situation or action, because of his direction, it cannot be said to be an act in the doing of which the doer is in the exercise of superintendence.² On the other hand, the plaintiff will not be precluded from a recovery merely by the fact that the person who was actually exercising superintendence, and in the carrying out of whose orders the plaintiff was injured, was at the time of the accident voluntarily assisting in manual labor.³ Thus where the plaintiff was engaged under the orders of a carman employed by the defendant, in unloading a van, the carman assisting in the work, and, obeying an implied direction of the carman, the plaintiff proceeded to do the work in

¹ *Kellard v. Rooke*, 19 Q. B. D. 585, 21 Q. B. D. 367.

² *Shaffers v. General Steam Navigation Co.*, 10 Q. B. D. 356. In this case the plaintiff and J. were employed together with others by the defendant in loading sacks of grain into the hold of a ship, and J.'s duty was to guide the crane by means of a guy-rope, and to give directions when to lower and hoist the crane, and, by his neglect to use the guy-rope, the plaintiff was injured, it was held that J. was "engaged in manual labor," and was not "a person having superintendence intrusted to him" within the meaning of sec. 1, sub-sec. 2, as defined by sec. 8. Where a quarryman, in general charge of a quarry, finding that the wadding still remained in a hole which he had assisted in drilling and loading with powder, and had attempted to discharge, negligently directed a fellow-workman to assist him in drilling out the wadding, whereupon the charge exploded, injuring the fellow-workman, it was held that the risk was not one which the injured workman assumed under his contract, and that the common employer might be liable under the Employers' Liability Act. *Malcolm v. Fuller*, 152 Mass. 160. The court distinguish the case of *Kenney v. Shaw*, 133 Mass. 501, where it was held, by the application of the rule of the common law, that the negligence of the quarryman, under very similar circumstances, was that of a fellow-servant, for which the common employer was not answerable. See *Cashman v. Chase*, 156 Mass. 342; *Fitzgerald v. Boston & Albany R. R.*, 156 Mass. 293.

³ *Osborne v. Jackson*, 11 Q. B. D. 619.

a dangerous manner, and was thereby injured, it was held that there was evidence in the case that the plaintiff was injured by reason of the negligence of a fellow-workman to whose orders the plaintiff was bound to conform and did conform.¹ The employer is not liable as for the negligence of his superintendent in furnishing his employee with a defective appliance, if the employer owes no duty to his employee to have the appliance inspected before use, and if it is no part of the superintendent's business to make such inspection, unless he assumes to do so, with the employer's knowledge and consent, as a part of the work which, as superintendent, he is employed to do.² The English Act provides that when "by reason of the negligence of any person in the service of the employer, who has the charge and control of any signal points, locomotive engine, or train upon a railway, the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."³ In determining whether the person through whose negligence the accident happens was "in charge or control," within the meaning of this provision, ordinary rules are applied; and it is held that if it appears that such person was not charged, as a vice-principal, with the control of the appliances mentioned in the section, the plaintiff cannot recover.⁴

¹ *Milward v. Midland Railway*, 14 Q. B. D. 68.

² *Shea v. Wellington*, 163 Mass. 364.

³ Sect. 1, sub-sect. 5. See Mass. Act, 1887, c. 270, § 1, cl. 3; Code, Ala., 1886, § 2590, cl. 5.

⁴ But in Massachusetts it is held that the words "who has charge or control of any train, etc.," mean one who, for the time being, at least, has immediate authority to direct the movements and management of the train as a whole and of the men engaged upon it; and such person need not be upon the train itself; he may be a laborer or a brakeman; and it is possible that more than one person may have "the charge or control" of a train at the same time. *Caron v. Boston & Albany R. R.*, 164 Mass. 523. So if a conductor engaged in "distributing" the cars of a train carelessly directs the locomotive against them, so that a brakeman on one of the cars is injured by the collision of the car with a "bunting post," the accident will be taken to be due to the negligence of the person "in

Thus it was the duty of an employee in the signal department of the defendant's railroad to keep in order the locking apparatus along a part of the line, and to make slight repairs, and for this purpose he was with several others subject to the orders of an inspector who was generally responsible for the work done. The plaintiff, who was employed in the same work, being injured by the negligence of the first employee, it was held that the defendant railroad was not responsible for the injury.¹ But where it was the business of a railway employee to propel cars along a line of rails at a station, he having the sole responsibility of doing the work properly, and by reason of his negligence in doing the work, another employee, engaged in similar work at the distance of about three hundred feet, was injured, it was held that the negligent employee was a person who had the charge or control of a train upon a railway, and so that the defendant was responsible for the injury.² The conductor of a freight train may properly be found to have been in charge thereof, when a brakeman on the train is injured by reason of a defect in one of the cars, although such conductor is temporarily absent upon a duty incident to the proper management of the train, and nothing is done meanwhile contrary to his orders or expectation of what would be done.³ The word "railway," as used in the Act, does not intend merely railways incorporated for general purposes, such as are subject to the provisions of the Railway Regulation Acts, but it includes also temporary railways, as one laid down by a contractor for building purposes.⁴ A locomotive and one or more cars, connected together and run upon a railroad, constitute a "train" within the meaning of the Acts.⁵

charge" of the train, although the car is, at the moment of the accident, separated from the other cars of the train. *Devine v. B. & A. R. R.*, 159 Mass. 348. The person in charge or control of a train may be the engine-driver or fireman, according to circumstances. *McCord v. Cammell* (1896), A. C. 57.

¹ *Gibbs v. Great Western Railway*, 11 Q. B. D. 22, 12 Q. B. D. 208.

² *Cox v. Great Western Railway*, L. R. 7 Q. B. D. 106.

³ *Donahue v. Old Colony R. R.*, 153 Mass. 356.

⁴ *Doughty v. Firbank*, 10 Q. B. D. 358.

⁵ *Dacey v. Old Colony R. R.*, 153 Mass. 112.

§ 234. **Agreement by the Employee not to take advantage of the Act: Effect of.** — It is held in England that if a workman make a contract with his master not to seek compensation for personal injuries under the Act, such an agreement is not against public policy, and so that the widow of an employee killed in the service, who, but for such an agreement on his part might have recovered damages for his death, will thereby be debarred from a recovery. This is upon the general ground that the effect of the statute upon the contract of service is merely to remove the presumption of an agreement by the servant to take the risk of injury by the negligence of his fellow-servant, and so that if the servant choose to waive, by stipulation, the benefits of the Act, the law will give effect to the stipulation.¹ In Georgia, under the statute enlarging the liability of railway corporations for injuries occurring to their employees,² it has been held, generally, that a stipulation that the employee will take the risk of injuries caused by the negligence of a fellow-servant is valid as against the employee, unless there was such extreme negligence on the part of the defendant as to show a recklessness of human safety; or unless the plaintiff was ignorant of the defect in the instrument furnished when he was called upon to use it.³ In Kansas, however, under a similar statute,⁴ it is held that a contract made in advance, whereby the servant agrees to hold the master harmless from the consequences of negligence for which the statute makes the master liable, is invalid; since it would be against public policy for the law to uphold contracts, made in advance, for the release of a statutory liability. The court says: "The general principle deduced from the authorities is that an individual shall not be assisted by the law in enforcing a contract founded on a breach or violation on his part of its principles or enactments; and this principle is applicable to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy; and the rule holds equally good, if there be no express provision

¹ Griffiths v. Dudley, 13 Q. B. D. 537.

² Code, 1873, §§ 2083, 3036. See § 225, *ante*.

³ Western & Atlantic R. R. v. Bishop, 50 Ga. 465.

⁴ Acts, 1874, c. 93, § 1. See § 225, *ante*.

of the statute peremptorily declaring all contracts in violation of its provisions void, in regard to all statutes intended generally to protect the public interests, or to vindicate public morals.”¹ In some of the States, it is provided by the statute that a contract shall be ineffectual and void which purports to relieve the employer from the statutory liability.² In Massachusetts, before the enactment of the Employers' Liability Act of 1887, it was provided that “no person or corporation shall, by special contract with persons in its employ, exempt him or itself from any liability which he or it might otherwise be under to such persons, for injuries suffered by them in their employment, and which result from the employer's own negligence or from the negligence of other persons in his or its employ.”³

¹ Kansas Pacific R. R. v. Peavey, 29 Kan. 170.

² Iowa, Rev. Code, 1880, § 1307; Wyoming, Comp. Laws, c. 97, § 1.
See § 225, *ante*.

³ Pub. Sts. Mass. c. 74, § 3.

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